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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), which authorizes one House of Congress to adopt a resolution invalidating an order of the Attorney General suspending the deportation of an alien under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1), is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or violates the principle of separation of powers.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, la-63a) is reported at 634 F.2d 408. The decisions of the immigration judge (App. B, *infra*, 64a-66a; App. D, *infra*, 70a-71a) and the opinion of the Board of Immigration Appeals (App. E, *infra*, 72a-73a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1980, and the notice of appeal (App. F,

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* The post-judgment motions to intervene filed by the United States Senate and the Speaker of the House of Representatives were granted by the court of appeals. See note 1, *infra*.

infra, 74a) was filed on January 19, 1981. On March 13, 1981, Justice Rehnquist extended the time for docketing the appeal to and including May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Articles I and II of the Constitution and Section 244 of the Immigration and Nationality Act of 1952 are set forth in App. J, *infra*, 79a-83a.

STATEMENT

1. Section 244(a)(1) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 214, 8 U.S.C. 1254(a)(1), authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien

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[1] On January 19, 1981, on the suggestion of the United States Senate and House of Representatives, which had participated as amici curiae in the court of appeals, that court extended to February 4, 1981, the time within which to petition for rehearing. On February 3, 1981, the Senate and the Speaker of the House filed motions to intervene and submitted a petition for rehearing with suggestion for rehearing en banc. On March 10, 1981, the panel entered an order (App. G, *infra*, 75a) granting the Senate and Speaker's motions to intervene and requesting the clerk to circulate their suggestion for rehearing en banc to the full court. The Senate and Speaker's petition for rehearing was denied and their suggestion for rehearing en banc was rejected on March 25, 1981 (App. H, *infra*, 76a). On April 16, 1981, the INS filed another notice of appeal (App. I, *infra*, 77a-78a) to ensure compliance with Rule 11.3 of the Rules of this Court. Because this appeal is being docketed within the allowable period following the filing of each notice of appeal, there is no need to consider whether the petition for rehearing filed by the Senate and the Speaker tolled the time in which to appeal.

must have been physically present in the United States for a continuous period of not less than seven years, must prove that he was and is a person of good moral character, and must be "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien" or to the alien's spouse, parent, or child who is a citizen or permanent resident alien. See *INS* v. *Wang*, No. 80-485 (Mar. 2, 1981).

Section 244(c)(1) of the Act, 8 U.S.C. 1254(c)(1), provides that "[u]pon application by any alien who is found by the Attorney General to meet the requirements of subsection (a)," the Attorney General "may in his discretion suspend deportation of such alien." If the alien's deportation is suspended, "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension" (*ibid.*). Section 244(c)(2) then provides that if, during the session of Congress in which the case is reported or the succeeding session, "either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien * * *." However, if neither House passes a resolution of disapproval during the period provided, "the Attorney General shall cancel deportation proceedings" pertaining to the alien. *Ibid.* Section 244(d) provides that, upon cancellation of the alien's deportation, the Attorney General shall record the alien's lawful admission for permanent residence as of the date of cancellation. 8 U.S.C. 1254(d).

2. Appellee Chadha, who is a native of Kenya and is of East Indian extraction, was lawfully admitted to the United States in 1966 on a nonimmigrant student visa. His visa expired in 1972. On October 11, 1973, the Immigration and Naturalization Service (INS) issued an order to show cause why appellee should not be deported. An immigration judge conducted deportation

proceedings in early 1974. In the course of those proceedings, appellee conceded that he was subject to deportation, but he filed an application for suspension of deportation under Section 244(a)(1) of the Act (App. A, *infra*, 2a).[2]

On the basis of evidence adduced at a hearing on appellee's application for suspension of deportation, supplementary affidavits, and the results of a character investigation conducted by the INS, the immigration judge, on June 25, 1974, ordered that appellee's deportation be suspended (App. B, *infra*, 64a-66a). The judge found that appellee had resided continuously in this country for seven years, was of good moral character, and would suffer "extreme hardship" if deported. The finding of extreme hardship was based principally on the fact that "it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation" (*id.* at 66a).[3]

Pursuant to Section 244(c)(1), a report of the suspension of appellee's deportation was transmitted to the appropriate committee of each House of Congress. On December 12, 1975, Representative Eilberg introduced a resolution (H.R. Res. 926, 94th Cong., 1st Sess.; see App. C, *infra*, 69a) disapproving the suspension of deportation of appellee and five other aliens. 121 Cong. Rec. 40247. On December 16, 1975, the resolution was

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[2] As authorized by 8 U.S.C. 1103, the Attorney General has delegated his power to administer and enforce the Act to the Commissioner of Immigration and Naturalization, who may redelegate that authority to any other officer or employee of the INS. 8 C.F.R. 2.1. The power to consider applications for suspension of deportation under Section 244 of the Act has been delegated to the special inquiry officers who conduct deportation proceedings (8 C.F.R. 242.8), subject to review by the Board of Immigration Appeals (8 C.F.R. 242.21). See *INS* v. *Wang*, *supra*, slip op. 1-2 n.2.

[3] Appellee is a citizen of the United Kingdom (App. B, *infra*, 64a) and held a British passport when he entered the United States (App. A, *infra*, 2a).

discharged from further consideration by the House Judiciary Committee. 121 Cong. Rec. 40800; App. C, *infra*, 67a-69a. Although Representative Wylie observed that "[t]his resolution has not been available to the Members of the House because it was not printed" (121 Cong. Rec. 40800 (1975); App. C, *infra*, 67a), Representative Eilberg emphasized that the disapproval resolution had to be passed during that session of Congress[4] or the aliens named in the resolution would be granted permanent resident status (121 Cong. Rec. 40800 (1975); App. C, *infra*, 68a). In support of the resolution, Representative Eilberg stated that "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended" (121 Cong. Rec. 40800 (1975); App. C, *infra*, 68a). The House passed the resolution without further debate or recorded vote. The resolution of disapproval was not passed by the Senate or presented to the President for his approval or veto.

Following passage of the House resolution of disapproval, the INS reopened appellee's deportation proceedings (App. D, *infra*, 70a-71a). Appellee contended in those proceedings that the provision in Section 244(c)(2) of the Act for congressional review of suspensions of deportation is unconstitutional "because it is violative of the separation of powers doctrine" (App. D, *infra*, 71a), but the immigration judge concluded that he had no authority to rule on the constitutionality of an Act of Congress. Accordingly, on November 8, 1976, the immigration judge ordered appellee deported to the United Kingdom. On appeal to the Board of Immigration Appeals, appellee contended that the resolution of disapproval passed by the House, which deprived him of relief under Section 244

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[4] The First Session of the 94th Congress ended three days later, on December 19, 1975, when the House and Senate adjourned sine die. 121 Cong. Rec. 42014, 42277.

of the Act, is unconstitutional (App. E, *infra*, 73a). The Board rejected this contention and dismissed the appeal, concluding (*ibid.*) that it had no power to declare a statute unconstitutional.

3. On March 24, 1977, appellee filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 106(a) of the Act, 8 U.S.C. 1105a(a).[5] Appellee again argued that the one-House veto provision in Section 244(c)(2) of the Act is unconstitutional, and the INS agreed with that contention. At the court of appeals' request, briefs amici curiae supporting the constitutionality of Section 244(c)(2) were filed on behalf of the House of Representatives and the Senate. App. A, *infra*, 3a. After thus considering the opposing views of the parties and the congressional amici,[6] the court of appeals held that

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[5] The petition for review had the effect of staying the deportation order pending the court of appeals' resolution of the case. 8 U.S.C. 1105a(a)(3).

[6] The court of appeals first addressed a number of threshold arguments raised by the Senate and House. See App. A, *infra*, 4a-24a. The court concluded (*id.* at 4a-11a) that it had statutory jurisdiction under 8 U.S.C. 1105a(a) to consider the constitutionality of the House's resolution of disapproval, even though that resolution was not adopted in the course of the administrative deportation proceedings, because the validity of the final order of deportation depended on the legality of that resolution. The court also concluded that appellee has standing to challenge the constitutionality of Section 244(c)(2) (App. A, *infra*, 12a-19a), that the case does not present a non-justiciable political question (*id.* at 20a-22a), and that there is a concrete controversy satisfying Article III requirements (*id.* at 22a-24a).

The court rejected amici's contention that the controversy became moot when appellee married an American citizen while the case was under submission. The court observed (App. A, *infra*, 17a-18a n.6) that although this made appellee eligible under Sections 201 and 204 of the Act, 8 U.S.C. 1151 and 1154, for permanent resident status by means of an immediate relative petition, no such petition had yet been filed on appellee's behalf and there was no certainty that such a petition would be granted by the INS if one were filed. Moreover, the court concluded that the

the one-House veto provision in Section 244(c)(2) of the Act contravenes the procedural requirements in Article I of the Constitution for the exercise of legislative power and violates the constitutional principle of separation of powers.

a. The court concluded that the provision for one House of Congress to override suspension decisions was not a valid exercise of Congress' legislative authority under Article I of the Constitution because a one-House veto does not comply with "important formal and procedural limitations" in Article I, Section 7—principally, the requirement "that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights" (App. A, *infra*, 59a). Thus, the court reasoned, if appellee's status under Section 244 prior to the passage of the resolution of disapproval by the House of Representatives was one of *nondeportability*, based on the Attorney General's determination, "then obviously that status cannot be changed by one house" (App. A, *infra*, 59a). But the court found the procedure equally violative of Article I, Section 7 if it were to accept amici's position that appellee's status prior to passage of the House resolution was one of *deportability*,

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case would not become moot even if appellee's wife were later to file (and the INS were to grant) an immediate relative petition, because appellee nevertheless would retain a personal stake in a decision on the constitutional issue by virtue of its effect on his eligibility for citizenship. Thus, in the court's view, if the House's resolution of disapproval did not affect the suspension of appellee's deportation, and his permanent resident alien status therefore commenced when the immigration judge first suspended his deportation in 1974, appellee would be eligible to apply for naturalization immediately because the necessary five-year waiting period under 8 U.S.C. 1427(a) already would have expired. On the other hand, if, at some future date, appellee becomes a permanent resident alien through an immediate relative petition filed by his wife, he would not become eligible to apply for naturalization until three years after the INS approved the immediate relative petition. 8 U.S.C. 1430(a).

We agree with the court of appeals' disposition of these issues.

which could only be altered if both Houses of Congress failed to object to the suspension of his deportation during the relevant time period (App. A, *infra*, 59a-60a):

> The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference.

Moreover, the court held that this departure from the requirements in Article I of the Constitution for enacting positive legislation was not supported by Congress' conceded power under Article I, Section 8 to "establish an uniform Rule of Naturalization * * * [and] to make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers * * *." The latter clause, the court explained, "authorizes Congress to 'make all *laws*,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional *form* in the exercise of that power" (App. A, *infra*, 56a; emphasis added).

b. The court also found the one-House veto device in Section 244(c) to be contrary to the established doctrine of separation of powers more generally embodied in the Constitution. The purpose of this separation, the court concluded, is to prevent the "dangerous concentration of power in one branch" (App. A, *infra*, 29a) and, thereby, "to preclude the exercise of arbitrary power" (*id.* at 30a, quoting *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). Quoting Blackstone, the court explained that where "the right both of *making* and *enforcing* the laws, is vested in one and the same man, or one and the same body of men[,] * * * there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical man-

ner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself" (App. A, *infra*, 31a, quoting 1 W. Blackstone, *Commentaries* *146-147) (emphasis in original).

The court acknowledged that some practical accommodation and interdependence among the branches is necessary (App. A, *infra*, 34a, 36a); at the same time, however, it recognized that judicial intervention is required to correct those "departures [from the constitutional assignment of powers] which undermine * * * the purpose mutually to check component powers * * *" (*id.* at 34a). The court cited as clear examples of such departures—which "[n]o doubt all could agree * * * violate the Constitution"—"an attempt by the Executive to enact a federal criminal code without congressional approval, or an attempt by Congress to exercise the prosecutorial and adjudicative responsibilities of enforcing the criminal law" (*ibid.*).

Section 244(c)(2), the court concluded, is another such prohibited departure from the constitutional assignment of powers because it allows one House of Congress to reverse a reasoned decision, "rendered under the law," that "was reached after the Executive had given consideration to an individual case" (App. A, *infra*, 53a). The court rejected the suggestion that this "interference with essential executive functions" (*ibid.*) is justified because Section 244(c)(2) was intended to permit Congress "to share in the administration of the statute" by "fill[ing] the interstices of statutory criteria" (App. A, *infra*, 52a). In the court's view, such "addition of more precise statutory criteria on an accretive, case-by-case basis is, in short, law enforcement" (*ibid.*; footnotes omitted); it is not merely "an attempt to alter future conduct of the Executive or to change its instructions" (*id.* at 54a). The court concluded in this regard that the Attorney General's informed and consistent implementation of the statute would be "thwarted if legisla-

tive interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed" (App. A, *infra*, 53a). Accordingly, in the court's view, Section 244(c)(2) "detracts from the authority of the second branch, and to that extent undermines its powers" (App. A, *infra*, 53a-54a).[7]

The court also rejected the related argument that the one-House veto could be viewed as a necessary "corrective device" (App. A, *infra*, 47a) to remedy what either House of Congress might perceive to be misapplications of the statutory eligibility criteria in individual cases. "By assuming the task of correcting misapplications of the law," the court reasoned, "Congress is performing a role [that is] ordinarily a judicial or an internal administrative responsibility" (*id.* at 48a). In addition, the court found a potential for Section 244(c)(2) to result in arbitrary treatment of individual aliens, because, under that Section, adjudications "may be set aside [by one House of Congress] for any reason, or no reason at all" (App. A, *infra*, 50a) and "[t]here are virtually no procedural constraints on the ultimate congressional decision nor any provision for review of Congress' legal or factual conclusions" (*id.* at 51a). For these reasons, the court concluded that Congress had violated the doctrine of separation of powers "by retaining a selective power to override individual adjudications, in lieu of changing standards prospectively by the usual, corrective device of a statutory amendment" (*ibid.*).

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[7] The court also concluded that the one-House veto device undercuts another purpose that it found to be furthered by the separation of powers—"to insure efficient administration by the unambiguous assignment of responsibility to specific branches" (App. A, *infra*, 54a). Thus, the court reasoned, the separation of powers "protects the Legislative branch, for example, from cumbersome entanglement in the myriad instances of execution of its laws and policy" (*id.* at 33a).

In view of this holding, the court of appeals ordered that the Attorney General's decision to stay appellee Chadha's deportation be deemed final and that deportation proceedings be deemed cancelled within the meaning of Section 244(d) of the Act. The court further ordered the Attorney General to cease and desist from taking any steps to deport appellee based on the resolution of disapproval passed by the House of Representatives (App. A, *infra*, 63a).[8]

THE QUESTION IS SUBSTANTIAL

The court of appeals has held unconstitutional a provision in an Act of Congress that authorizes one House of Congress, without the concurrence of the other House or the approval of the President, to nullify a decision made in the execution of that Act by the responsible officer of the Executive Branch. This case therefore presents constitutional issues of the most fundamental nature regarding the distribution of powers among the branches of the federal government and the manner in which those powers may be exercised.

Section 244(c)(2) of the Immigration and Nationality Act allows one House of Congress effectively to amend the Act to except a particular alien from the relief generally afforded to aliens who are found by the Attorney General to be eligible for suspension of deportation. Section 244(c)(2) therefore authorizes an unconstitutional exercise of Congress' legislative powers, for it allows one House of Congress to take action purporting to have the effect of an amending law without regard to the require-

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[8] The court held that the one-House veto provision in Section 244(c)(2) is severable from the remainder of Section 244 because of the severability clause in Section 406 of the Act (ch. 477, 66 Stat. 281) and because severability would further the statutory purpose of relieving Congress of the burden of considering private bills by providing an administrative mechanism for the granting of suspension of deportation (App. A, *infra*, 12a-16a). See *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976).

ments in Article I of the Constitution that any exercise by Congress of its legislative powers must receive the concurrence of both Houses and be submitted to the President for his approval or veto.

Section 244(c)(2) also violates the separation of powers under the Constitution by involving the Legislative Branch in the execution of the law. That Section authorizes one House of Congress to overrule a particular determination made by the officer of the United States charged with administering the Immigration and Nationality Act and to direct that officer to make a different disposition of the case, just as the President might guide or instruct subordinate Executive Branch officials in fulfillment of his constitutional obligation to "take Care that the Laws be faithfully executed" (Art. II, § 3). Such overruling of individual determinations under the Act, when not accomplished by statute, plainly constitutes the execution of the law. Execution of the law is, of course, a function that the Framers deliberately withheld from Congress and assigned to the President and officers of the Executive Branch.

If Section 244(c)(2) were found to be constitutional, it would appear that Congress could enact a law (no doubt over the President's veto) permitting one of its Houses to disapprove *every* decision or action by the President or any other officer of the United States in executing an Act of Congress. The result would be to strip the Executive Branch of the independence intended by the Framers and to transfer the ultimate decision-making authority in executing the laws to the Legislative Branch. The decision in this case therefore will broadly affect the separation of powers between the Legislative and Executive Branches.[9]

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[9] We believe it is clear that the INS may appeal under 28 U.S.C. 1252 from the judgment below holding an Act of Congress unconstitutional despite the fact that the INS took the position in the court of appeals that Section 244(c)(2) of the Act is unconstitutional. Judgment was rendered against the INS, and the Attorney

1.a. Article I, Section 1 of the Constitution provides that "[a]ll legislative Powers" granted by the Constitution "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The legislative power granted by the Constitution is, of course, "the authority to make laws" (*Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976), quoting *Springer* v. *Phillippine Islands*, 277 U.S. 189, 202 (1928); see also *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923)). And the Constitution is explicit about the manner in which laws are to be made.

Because Article I, Section 1 vests all legislative powers jointly in the Senate and House of Representatives, every proposed law first must be passed by both the Senate and the House. Section 7, Clause 2 of the same Article in turn provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, *before it becomes a Law*, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated" (emphasis added). If

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General was ordered to cease and desist from taking any steps to deport appellee Chadha based upon the resolution of disapproval adopted by the House of Representatives (App. A, *infra*, 63a). Compare *United States* v. *Lovett*, 328 U.S. 303, 306-307 (1946), and *Perez* v. *Ledesma*, 401 U.S. 82, 84 n.1 (1971), with *Gunn* v. *University Committee*, 399 U.S. 383, 390 n.5 (1970), and *Public Service Comm'n* v. *Brashear Lines*, 306 U.S. 204, 206 (1939).

The purpose of 28 U.S.C. 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality" (*McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975)). That purpose is served by the INS's appeal in this case, even though the INS again will assert that the one-House veto provision is unconstitutional. An adversary presentation of the issues will be assured in this Court by the participation of the Senate and House of Representatives, which have the principal interest in sustaining the constitutionality of Section 244(c)(2). See *United States* v. *Lovett*, *supra*, 328 U.S. at 304, 307; see also *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968).

the President disapproves the bill, "it shall become a Law" only if two-thirds of the Members of each House vote to override the President's veto (Art. I, § 7 cl. 2).[10] The Framers deemed the veto provision to be so fundamental that they adopted Clause 3 of Article I, Section 7, to ensure that Congress could not evade Presidential review by passing measures intended to have the effect of law in a form other than a "Bill," to which Clause 2 expressly refers.[11]

The constitutional principles of bicameralism and Presidential review of legislation are not matters of mere form or ritual; they go to the very heart of the assignment of powers under our constitutional system.[12] As

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[10] Section 7, Clause 2 further provides that if the President does not return a bill within 10 days after it has been presented to him, "the Same shall be a Law," unless Congress by its adjournment prevents a return of the bill, "in which Case it shall not be a Law."

[11] During the debate on the veto provision, Madison,

> observing that if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—proposed that 'or resolve' should be added after *'bill'* in the beginning of sect 13. with an exception as to votes of adjournment &c.

II M. Farrand, *The Records of the Federal Convention of 1787*, at 301 (rev. ed. 1937) (emphasis in original). Madison's proposal was adopted by the Convention (*id.* at 303-305). That proposal, as embodied in Clause 3 of Article I, Section 7, provides that "[*e*]*very* Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; *and before the Same shall take Effect*" shall be approved by him or passed over his veto "according to the Rules and Limitations prescribed [in Section 7, Clause 2] in the Case of a Bill" (emphasis added).

[12] Resolutions adopted by each House regarding internal matters or in aid of its legislative function need not be passed by the other House or be presented to the President. See, *e.g.*, Art. I, § 5, cl. 1 (election and qualification of Members); Art. I, § 2, cl. 6 (selection of officers); Art. I, § 3, cl. 5 (same); (Art. I, § 5, cl. 2) (adoption of rules and punishment of Members); *Buckley* v. *Valeo*,

this Court recently stated, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 129; footnote omitted); see *id.* at 129 n.166. One of the protections the Framers fashioned against this potential, Madison explained, was "to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit" (*The Federalist* No. 51, at 350 (J. Cooke ed. 1961)). The principle of bicameralism was expected to prevent precipitate legislative action by providing a greater opportunity for due deliberation in the course of consideration by the two differently constituted Houses. *Ibid.*; *The Federalist* No. 62 (J. Madison), at 417-422 (J. Cooke ed. 1961); III M. Farrand, *The Records of the Federal Convention of 1787*, at 110 (1911) (remarks of Charles Pinckney).[13]

The Presentation Clauses likewise were intended as a check against possible abuses in the exercise of legislative power. The opportunity for Presidential review of legislation would, the Framers believed, prevent Congress from encroaching upon the powers of the President and would protect against "bad laws" [14] and hasty or thought-

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supra, 424 U.S. at 137-138) (investigation and subpoena of witnesses). See also Art. I, § 2, cl. 5 (impeachment); Art. I, § 3, cl. 6 (trial of impeachment). A resolution adopted by both Houses of Congress proposing a constitutional amendment (Art. V) does not constitute the exercise of legislative power and therefore need not be presented to the President for approval. *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798).

[13] Where the Framers thought a departure from the principle of bicameralism was appropriate in matters affecting the Executive Branch, they expressly so provided. See Art. II, § 2, cl. 2 (provision for advice and consent of the Senate to the making of treaties and appointment of officers of the United States).

[14] See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952); but see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 285 (White, J., concurring in part and dissenting in part).

less action by the legislature. *The Federalist* No. 73 (A. Hamilton), at 495 (J. Cooke ed. 1961); see also I M. Farrand, *supra*, at 97-106, 108, 139-140; II M. Farrand, *supra*, at 73-80, 229-301, 587; III M. Farrand, *supra*, at 148-149.

b. Section 244(a)(1) of the Immigration and Nationality Act authorizes the Attorney General, in his discretion, to suspend the deportation of and grant permanent resident status to an alien whose deportation would, "in the opinion of the Attorney General," cause extreme hardship. The designated delegate of the Attorney General found, after a hearing, that appellee Chadha satisfied this requirement and the other eligibility criteria. The resolution of disapproval adopted by the House of Representatives requires appellee to be deported notwithstanding that determination. The effect of the resolution, therefore, is to amend Section 244 to except appellee from the relief that section affords aliens who are found by the Attorney General to be eligible for suspension of deportation. In this respect, the resolution is indistinguishable from a duly enacted law that repeals or amends a previously enacted law under which an individual had been found to be entitled to benefits. Because the House resolution disapproving suspension of appellee's deportation was not passed by both Houses of Congress and presented to the President in the manner required before any such measure intended to have the effect of a law "shall take Effect" (Art. I, § 7, cl.3), that resolution cannot be given effect here to require appellee's deportation.

If Section 244(c)(2) had never been enacted, it could not seriously be contended that a resolution of disapproval passed by only one House and never presented to the President would be binding on the Attorney General. But if this much is conceded, it must follow that Congress cannot accomplish the same result indirectly—and thereby evade the explicit constitutional procedure for the enactment of legislation—simply by passing a statute *authorizing* one of its Houses to adopt a resolution that will have the effect of a law.

By incorporating the principles of bicameralism and Presidential review of legislation into the *Constitution*, the Framers intended to erect formidable and enduring checks against improvident legislative action and congressional encroachment upon the Executive. Such fundamental protections cannot be waived or dispensed with by mere *legislation* passed by the very branch of government whose powers were sought to be restrained. Otherwise, these safeguards would be lost, perhaps permanently, whenever Congress was able to muster two-thirds of the Members of each House to override a Presidential veto of the legislation authorizing one or both Houses to adopt measures having the force of a law or whenever the President, because of the exigencies of the moment, felt compelled to approve such authorizing legislation. See, *e.g.*, Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357 (1953); cf. *United States* v. *Lovett*, 328 U.S. 303, 313 (1946). Moreover, as we have explained (see page 14, *supra*), Clause 3 of Article I, Section 7, was adopted by the Constitutional Convention for the very purpose of preventing both Houses of Congress from evading the procedures for the passage of a measure intended to have the effect of a law simply by labeling the measure something other than a "Bill." It follows a fortiori that Congress cannot circumvent those procedures by authorizing just *one* of its Houses, acting alone, to pass a "resolution" of disapproval purporting to have the effect of a law.

We do not question that the House Judiciary Committee reached its view of appellee's eligibility for suspension of deportation after a conscientious application of its interpretation of the statutory eligibility criteria. But as this Court recently observed with respect to the "extreme hardship" criterion, "[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction" (*INS* v. *Wang*, *supra*, slip op. 5). Given this, a final legislative determination of appellee's eligibility for suspension of deportation might well have benefited from the opportunity for due deliberation and

a detached second opinion that the Framers intended to be afforded by bicameral consideration of positive legislation. This determination would have benefited as well from an opportunity for objective review of any such proposed legislation by the President, after being advised by the Attorney General and his delegates in the INS who are experienced in the administration of the immigration laws (see *INS* v. *Wang*, *supra*, slip op. 5).[15]

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[15] In the court of appeals, the Senate and House of Representatives argued that the requirements of the Presentation Clauses could be avoided if the operation of Section 244(c)(2) were characterized in a different fashion. Thus, they argued that, even after the Attorney General's finding of eligibilty, an alien's status is one of *deportability* until both Houses fail to object to suspension of deportation during the relevant time period. They analogized the effect of the House's resolution of disapproval in this case to the failure of the House affirmatively to vote in favor of a private bill suspending appellee's deportation. Under this view, it is the nonobjection of both Houses that operates to change the law and render an alien eligible for suspension of deportation. App. A, *infra*, 59a-60a. This argument is without merit. The explicit procedures governing the exercise of legislative power, carefully crafted by the Framers to confine the power of Congress and to prevent evasion by Congress, cannot be circumvented simply by characterizing that circumvention in a different way.

In any event, the operation of the one-House veto is not at all analogous to the legislative process, even under the Senate and House's view. Article II, Section 3 of the Constitution authorizes the President to recommend to Congress such "[M]easures as he shall judge necessary and expedient," but those measures do not become law unless they are affirmatively passed by each House of Congress and approved by the President or passed over his veto. Under the analogy advanced by the Senate and House in the court of appeals, however, the Attorney General's decision would become a "law," after it is submitted to Congress, in the *absence* of affirmative action by either House. As the court of appeals observed, moreover, the inaction of either House could be ascribed to "endorsement, acquiescence, passivity, indecision, or indifference" (App. A, *infra*, 60a)—or, we might add, to inattention or inadvertence. Thus, under the Senate and House's characterization, there would be no requirement for an actual concurrence of the two Houses in the manner contemplated for the enactment of positive law under the bicameral system adopted by the Framers. Moreover, because under this view the Attorney General's decision becomes

2. Section 244(c)(2) of the Immigration and Nationality Act also violates the doctrine of separation of powers more generally embodied in the Constitution. Section 244(a)(1) assigns to the Attorney General and his delegates the administrative responsibility to commence and conclude deportation proceedings against an alien, including the discretionary authority to determine whether an alien is eligible for suspension of deportation and permanent resident alien status under the criteria established in the Act. Performance of these functions plainly constitutes the execution of the law.[16]

As the Court held in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 138-141, such administrative and enforcement authority pursuant to public law must be exercised by "Officers of the United States" appointed in conformity with the Appointments Clause, Art. II, § 2, cl. 2. These functions cannot be performed by officials appointed by Congress. Congress has not sought in Section 244 of the Immigration and Nationality Act to appoint (or to authorize one of its Houses to appoint) the persons who will administer and enforce the law. Instead, it has reserved to either of its Houses the power to overrule a decision made by the officer of the United States responsible for executing the law—much as the President or another official of the Executive Branch might over-

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a "law" without any action by Congress, the Executive would, in effect, *make* the laws, not merely recommend and later review them in the manner prescribed in Article II, Section 3 and the Presentation Clauses. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 587. Under the Senate and House's characterization, then, the one-House veto provision entails a complete *reversal* of the constitutionally established roles of the Legislative and Executive Branches in the enactment of legislation.

[16] The Court noted in *Buckley* that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3" (424 U.S. at 138). The authority to commence deportation proceedings and to cancel them in appropriate circumstances (*Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869)) is of a similar nature.

rule or direct the decision of a subordinate official. This act of overruling, when not done by statute, is therefore itself executive in nature. But as the Court explained in *Buckley*, " '[n]ot having the power of appointment, * * * the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection' " (424 U.S. at 139, quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928)). It necessarily follows that Congress cannot engraft upon the offices of the Members of one of its Houses the power to nullify the decision of the Attorney General that an alien is eligible for suspension of deportation.

This is not an instance in which Congress, by *legislation*, has regulated the manner in which decisions affecting the operation of the Executive Branch shall be made, while vesting final decision-making authority in the President or in an officer of the United States subject to his direction. Compare *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443-445 (1977); *id.* at 498-500 (Powell, J., concurring in part and concurring in the judgment). Rather, Congress has vested in one of its Houses the final decision-making authority in the execution of the law. This uniting of legislative and executive powers in the same branch is the very eventuality the Framers sought to prevent, in order to preserve liberty, " 'because apprehensions may arise lest *the same* monarch or senate *enact* tyrannical laws to *execute* them in a tyrannical manner' " (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 120, quoting *The Federalist* No. 47 (J. Madison), at 299 (G. P. Putnam's Sons ed. 1908)).

As Madison explained in *The Federalist* No. 48, at 332 (J. Cooke ed. 1961):

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630 (1935). This principle is violated by Section 244(c)(2), in which Congress has delegated to either of its Houses the final authority to "administer" suspensions of deportation where the Attorney General has made a determination in favor of the alien and to "overrule" the Attorney General's decision when it so desires. If, under our constitutional scheme, Congress may vest this power in one of its Houses with respect to determinations under the Immigration and Nationality Act, there would appear to be no reason why it could not do so with respect to *every* decision by an officer of the United States under *any* Act of Congress. This would, of course, effectively vest the "*whole* power" of the Executive Branch in one House of the Legislative Branch, and thereby "[subvert] the fundamental principles of a free constitution" (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 442 n.5, quoting *The Federalist* No. 47 (J. Madison), at 325-326 (J. Cooke ed. 1961); emphasis in original).

3. Statutory provisions authorizing one House of Congress to overrule determinations made pursuant to law by those charged with administering the law are of relatively recent origin, dating principally from a provision in a reorganization statute passed in 1932. See Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. Rev. 423, 426-427 (1978). They therefore cannot be thought to be essential to the effective working of the form of government established by the Constitution.[17] Indeed, except

[17] Congress has ample other means at its disposal by which it can control the actions of the Executive Branch. Congress may enact more detailed statutory criteria to be applied by the Executive. It may repeal a law when it believes the Executive has interpreted it improperly or limit "the duration of laws so as to require renewal instead of repeal" (II M. Farrand, *supra*, at 587 (Madison)). Congress or one of its Houses also may pass a resolution expressing its views on matters within the Executive's domain, which no doubt would carry significant political, if not legal, force. Jackson, *supra*, 66 Harv. L. Rev. at 1355. Congressional oversight through hearings and investigations can have a similar effect.

for a number of measures adopted during World War II, "legislative veto" provisions have been enacted principally within the last decade.[18] These provisions have been enacted despite the view of this and previous Administrations that various forms of congressional control of executive action, short of duly enacted legislation, are unconstitutional.[19] This fundamental constitutional issue therefore is ripe for resolution.[20]

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[18] See H.R. Doc. No. 95-357, 95th Cong., 2d Sess. 1 (1978) (noting that at least 48 legislative veto provisions had been enacted during the four years prior to 1978, more than had been enacted during the preceding 20 years); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1089-1094 (1975).

[19] See, *e.g.*, H.R. Doc. No. 95-357, 95th Cong., 2d Sess. (1978) (President Carter) (message expressing general view that legislative veto provisions are unconstitutional); 10 Weekly Comp. of Pres. Doc. 1279 (Oct. 12, 1974) (President Ford) (veto of bill providing for law to become effective upon report to Congress by Joint Committee on Atomic Energy); 9 Weekly Comp. of Pres. Doc. 1285-1287 (Oct. 24, 1973) (President Nixon) (veto of War Powers Resolution providing, *inter alia*, for termination of certain authority upon passage of concurrent resolution); 1 Weekly Comp. of Pres. Doc. 432-433 (Aug. 22, 1965) (President Johnson) (expressing constitutional objection to bill requiring approval by House and Senate committees for expenditure of public works funds); Pub. Papers 6 (1964) (President Kennedy) (expressing constitutional objection to provision for Appropriations Committee of either House to veto any foreign assistance program carried forward from prior years); 101 Cong. Rec. 10459-10460 (1955) (President Eisenhower) (expressing constitutional objection to provision for committee of House or Senate to veto termination of civilian defense activities); 98 Cong. Rec. 9756 (1952) (President Truman) (veto of bill requiring House and Senate committees to approve leases for postal facilities); 83 Cong. Rec. 4487 (1938) (President Roosevelt) (explanation of constitutional objection to proposal for two-House veto of reorganization plans); 76 Cong. Rec. 2445 (1933) (President Hoover) (veto of bill requiring approval of certain tax refunds by Joint Committee on Internal Revenue Taxation); 59 Cong. Rec. 7026-7027 (1920) (President Wilson) (veto of bill requiring approval by Joint Committee on Printing for printing of government publications).

[20] The only federal court other than the court of appeals in this case to reach the ultimate question of the constitutionality

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1981

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of a "legislative veto" device is the Court of Claims in *Atkins* v. *United States*, 556 F.2d 1028, 1057-1071 (1977), cert. denied, 434 U.S. 1009 (1978). The holding in that case was narrowly restricted to the context of the Federal Salary Act, 2 U.S.C. 369(1)(B). See 556 F.2d at 1059. See also *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140 n.176 (declining to address the question of the validity of a one-House veto provision in the Federal Election Campaign Act of 1971, 2 U.S.C. 438(c), an issue not briefed by the United States, see Br. 111-112); but see 424 U.S. at 257 (White, J., concurring in part and dissenting in part); *Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 500 n.4 (Powell, J., concurring in part and concurring in the judgment) (noting that the validity of the legislative veto provision in Section 104(b) of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2107 note, was not before the Court); *McCorkle* v. *United States*, 559 F.2d 1258, 1261-1263 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (declining, on severability grounds, to reach the issue of the constitutionality of the same provision of the Federal Salary Act that was at issue in *Atkins*); *Clark* v. *Valeo*, 559 F.2d 642, 647-650 (D.C. Cir.) (en banc), aff'd mem. *sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977) (declining, on ripeness grounds, to consider the constitutionality of the "legislative veto" provision in the Federal Election Campaign Act).

APPENDIX A

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Argued and Submitted before a panel consisting of Ely, Carter and Kennedy, Circuit Judges,

April 10, 1978

Submission ordered withheld, April 14, 1978.

Reassigned to a panel consisting of Ely, Kennedy and Hug, Circuit Judges, Aug. 13, 1980

Resubmitted and Decided Dec. 22, 1980

Alan B. Morrison, Washington, D. C., for petitioner.

John M. Harmon, Dept. of Justice, Eugene Gressman, Cornelius B. Kennedy, Washington, D. C., argued, for respondent; Henry C. Petersen, Washington, D. C., on brief.

Petition for Review of an Order of the Immigration and Naturalization Service.

Before ELY, KENNEDY and HUG, Circuit Judges.

KENNEDY, Circuit Judge:

Petitioner, Jagdish Rai Chadha, seeks review of an order of deportation issued by the Immigration and Naturalization Service (INS). The Executive branch of the Government, acting by an inquiry officer who conducted an administrative hearing on the record,

determined that Chadha, though otherwise deportable, should remain in the United States to avoid extreme hardship. Subsequently the Congress, acting only by the House of Representatives, sought to reverse that determination. If given effect, the congressional action would require Chadha's deportation. We hold that the statutory mechanism by which the Congress acted to reverse the administrative determination is unconstitutional, and therefore that the deportation order is invalid.

Chadha, a native of Kenya and a holder of a British passport, lawfully entered the United States as a nonimmigrant student in 1966. After he received his bachelor's and his master's degrees, his student visa expired in 1972. In 1974, the INS issued an order to show cause why Chadha should not be deported. A special inquiry officer then held a deportation hearing pursuant to Immigration and Nationality Act (INA) section 242(b), 8 U.S.C. § 1252(b) (1976). At the hearing, Chadha conceded his deportable status, but requested a suspension of deportation pursuant to INA section 244(a)(1), 8 U.S.C. § 1254(a)(1) (1976). The special inquiry officer granted Chadha's request, in part because he found that "it would be extremely difficult, if not impossible, for [Chadha] to return to Kenya or go to Great Britain by reason of his [East Indian] racial derivation."

At the close of the hearing, the officer found that Chadha met the requirements of section 244(a)(1): he had been in the United States for over seven years, was of good moral character and would suffer "extreme hardship" if deported. The officer then suspended deportation pending congressional action. The officer further ordered, however, that the proceedings would be reconvened should Congress take adverse action.

On December 16, 1975, the House of Representatives passed House Resolution 926 disapproving the suspension of Chadha's deportation. 121 Cong. Rec. 40,800 (1975). This disapproval had the effect of overriding the special inquiry officer's decision. INA § 244(c)(2), 8 U.S.C. §1254(c)(2) (1976). Accordingly, Chadha's deportation proceedings were reconvened, and the INS special inquiry officer entered a final order of deportation. Chadha then unsuccessfully appealed to the Board of Immigration Appeals and now petitions this court pursuant to INA section 106(a), 8 U.S.C. § 1105a(a) (1976).

Chadha contends that the procedure for congressional disapproval provided by section 244(c)(2), 8 U.S.C. § 1254(c)(2) (1976), is unconstitutional. Although he raised this contention before both the special inquiry officer and the Board of Immigration Appeals, neither decided this question as both concluded they had no power to decide the constitutionality of statutes. On this petition for review, respondent Immigration and Naturalization Service agrees that section 244(c)(2) is unconstitutional. We therefore requested both the House of Representatives and the Senate to file briefs as amici curiae. *See, e. g., Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9, 88 S.Ct. 1970, 1973 n.9, 20 L.Ed.2d 1037 (1968); *Atkins* v. *United States*, 556 F.2d 1028, 1058 (Ct.Cl. 1977) (per curiam) (en banc), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). They have done so, and before we reach the merits, we must first answer various challenges to our jurisdiction and the justiciability of Chadha's case.

I. Procedural Questions

A. *Jurisdiction*

Amici initially contend that this court lacks jurisdiction. Their claim is based on INA section 106(a), 8 U.S.C. § 1105a(a) (1976), which states that a petition for review in the Court of Appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act [8 U.S.C. § 1252(b)]." Citing this language, amici make two assertions. First, although they concede Chadha is subject to a final order of deportation, they argue that Chadha, by conceding deportability, has not challenged any determination made during "administrative proceedings"; rather, his challenge is to the House of Representatives' decision to disapprove the suspension of deportation. Second, amici contend that since the Board of Immigration Appeals lacked the power to pass on the INA's constitutionality, it could not make any order pursuant to section 242(b) which could form the basis of a petition challenging the validity of the congressional procedure.

Amici's first argument, that Chadha seeks review not of a decision made during "administrative proceedings" but of a legislative decision made outside of section 242(b), is without merit. Amici would have us read "final orders . . . made . . . pursuant to administrative proceedings under section 242(b)" to limit appellate review to only the actual decisions and conclusions made by the special inquiry officer during a section 242(b) hearing. We think that this construction of "final orders" is inconsistent with both

congressional intent and a sensible interpretation of the statute. We conclude the phrase "final orders" includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing. Under amici's construction our review would be essentially empty, for we could review only the special inquiry officer's ministerial execution of a substantive decision that was made elsewhere.

Our construction is consistent with well established precedent in this circuit. In *Waziri* v. *INS*, 392 F. 2d 55 (9th Cir. 1968), for example, an alien challenged the validity of an INS rescission of his permanent resident status. While this decision rendered Waziri immediately deportable, *id.* at 56-57, it was not appealable under section 106. *See Bachelier* v. *INS*, 548 F.2d 1157, 1158 (5th Cir. 1977). After a section 242(b) hearing Waziri was ordered deported. On petition to this circuit, he attempted to challenge the validity of the INS rescission, but was met with the argument that the rescission was a determination made outside of a section 242(b) proceeding and thus was not reviewable under section 106. The court rejected this argument, stating that section 106 included the power to review "logical predicates" to deportation orders that are "integrally related" to and interdependent with the final order. 392 F.2d at 56-57. The INS rescission order belonged to this class: it rendered an alien immediately deportable, was not directly appealable, and reduced the section 242(b) proceeding to a mere execution of the consequences of being deportable. The court reasoned that if section 106 did not permit review, the possibility existed for numerous other challenges, by way of district court habeas corpus petitions, to the

same deportation order. *Id.* at 57. This was found contrary to the congressional intent of consolidating review of deportation orders. *Id.* Further, since the "technical correctness" of the order could not be questioned, the court found that Congress would not have desired such a "routine" or "perfunctory" approval of deportation orders in the Court of Appeals. *Id.* In such cases then, the court found that the power of review under section 106 permitted review of the substantive matters underlying the final deportation order. *See also Bachelier* v. *INS*, 625 F.2d 902, 904 (9th Cir. 1980); *Ferrante* v. *INS*, 399 F.2d 98 (6th Cir. 1968).

Waziri's rationale extends to Chadha's case. Like the status rescission involved in *Waziri*, the congressional disapproval of section 244(c)(2) is a substantive decision made outside of a section 242(b) proceeding but which nevertheless directly leads to a final order of deportation. In addition, if we find that section 106 precludes review, the distinct possibility exists that there will be numerous other hearings in the federal system on the constitutionality of section 244(c)(2). Finally, the necessary interdependence is present: a congressional disapproval under section 244(c)(2) leads proximately and automatically to a final deportation order, is not directly appealable, and results in a mere ministerial execution of its terms in the actual section 242(b) proceeding. Following *Waziri*, we find that the congressional disapproval under section 244(c)(2) is the type of action that is integrally related to a final deportation order and that section 106 permits substantive review. We hold that the phrase "final orders . . . made . . . pursuant to administrative proceedings under section 242(b)" encompasses review not only of determina-

tions actually made at a section 242(b) hearing, but also of the legal validity of determinations on which the final order of deportation is contingent.

Cheng Fan Kwok v. *INS*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1968), relied upon by amici, is not contrary. In that case, the Court held that a circuit court had no jurisdiction to review a denial of a stay of deportation, an order controlled not by section 242(b) but by administrative regulations. Further, the alien in *Cheng Fan Kwok* had filed for the discretionary relief after a final order of deportation had been entered, whereas Chadha's request here was made at his deportation hearing. Thus, Cheng was not appealing from a final order, but rather was appealing from an independent denial of discretionary relief. Following its prior case of *Foti* v. *INS*, 375 U.S. 217, 84 S.Ct. 306, 11 L.Ed.2d 281 (1963), the Court then found that the Attorney General's denial of Cheng's application for discretionary relief, independent of a final order of deportation, was not a determination "made during and incident to the administrative proceeding," *Foti*, 375 U.S. at 229, 84 S.Ct. at 314, and thus held that the circuit court lacked jurisdiction. *Cheng Fan Kwok*, 392 U.S. at 215-18, 88 S.Ct. at 1975. *See also Reyes* v. *INS*, 571 F.2d 505, 507 (9th Cir. 1978); *Ruiz-Mancilla* v. *INS*, 571 F.2d 510 (9th Cir. 1978). In formulating its holding, the Court in *Cheng Fan Kwok* stated that section 106 extended jurisdiction not only to petitions challenging orders entered during section 242(b) proceedings, but also to petitions "directly challenging deportation orders themselves." 392 U.S. at 215, 88 S.Ct. at 1975.

Chadha's deportation order in the second administrative proceedings flowed directly from the one-

house disapproval. In the first stage of his deportation hearing, Chadha applied for and received a suspension of deportation. Congress then disapproved of his suspension. The Attorney General, in accordance with section 244(c)(2), then began to have Chadha "deport[ed] . . . in the manner provided by law" by reconvening the original section 242(b) proceeding and ordering Chadha deported. It blinks reality to hold, as amici urge, that such congressional action was not "incident to" the proceeding, *Foti*, 375 U.S. at 229, 84 S.Ct. at 314, or "integrally related" to Chadha's deportation order, *Waziri*, 392 F.2d at 56. As the validity of the final deportation order is contingent upon the validity of the congressional action under section 244(c)(2), Chadha is very clearly "directly challenging [the] deportation order [itself]," *Cheng Fan Kwok*, 392 U.S. at 215, 88 S.Ct. at 1975, and thus jurisdiction exists under section 106.[1]

The consequences of finding an absence of jurisdiction would, moreover, be directly contrary to Congress' intent in enacting section 106. All parties agree that if jurisdiction is absent, Chadha would be relegated to challenging the INA's constitutionality in a district

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[1] In *Giova* v. *Rosenberg*, 379 U.S. 18, 85 S.Ct. 156, 13 L.Ed. 2d 90 (1964) (per curiam), *Foti* was extended to motions to reopen deportation hearings. *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 88 S.Ct. 1970, 20 L.Ed.2d 1037 (1968), harmonized these two decisions by stating that aliens may seek review, under section 106, of determinations which are " 'intimately and immediately associated' with the final order they seek to challenge." *Id.* at 217, 88 S.Ct. at 1976. Further, the Court found that "Congress quite deliberately restricted the application of § 106(a) to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves." *Id.* at 215, 88 S.Ct. at 1975.

court habeas corpus petition. Such a procedure would fly in the face of the explicit congressional intent "to expedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts . . . ." *Foti* v. *INS*, 375 U.S. 217, 226, 84 S.Ct. 306, 312, 11 L.Ed.2d 281 (1963). Congressional intent, as expressed by the author of the bill that was eventually to become section 106, was that "[i]nstead of the multitudinous and repetitive court reviews now available by virtue of judicial interpretations, . . . a special single form of judicial review by the court of appeals [would be set up]." 107 Cong.Rec. 12,176 (1961) (Remarks of Rep. Walters). *See also* H.Rep. No. 565, 87th Cong., 1st Sess. 1, 3, 13 (1961); Note, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 Yale L.J. 760 (1962).

Amici would have us ignore this history. To adopt their position, in cases where both deportability and the INA are challenged, would require one hearing in the court of appeals on deportability and, if all appeals are taken, potentially three other hearings in the federal court system on the constitutional challenge. The waste of judicial resources and the delay entailed by such a scheme directly contradict Congress' intent to have one "single, separate, statutory form of judicial review." H.Rep.No. 565, 87th Cong., 1st Sess. 1 (1961). *See Marcello* v. *Attorney General*, 495 F.2d 171, 173 (D.C. Cir. 1974) (Leventhal, J.). Further, Congress was acutely aware that many of the dilatory judicial proceedings it sought to limit included constitutional attacks on the INA. H. Rep. No. 565, *supra*, at 2, 11. It would be anomalous then, for Congress to provide a single form of review for deportability determinations, yet preclude from that same appeal any

questions of the INA's constitutionality.[2] We reject amici's construction of section 106 and find that review of final deportation orders includes review of matters upon which the final order is contingent.

Amici's second argument, that since the INS was unable to adjudicate the INA's constitutionality it could make no finding forming the basis of constitutional review under section 106, misconceives the nature of our review. It is immaterial that the INS lacked the power to pass on the INA's constitutionality. The adjudication of constitutional questions has, and always will be, the primary responsibility of the Judiciary. As we recently stated in *Hernandez-Rivera* v. *INS*, 630 F.2d 1352, 1355 (9th Cir. 1980), the task of passing on the constitutionality of the INA "is within the exclusive province of the federal courts." Thus, this court, as well as courts of other circuits, has found jurisdiction under section 106 to adjudicate the constitutionality of the INA. *See, e.g., Hernandez-Rivera, supra; Menezes* v. *INS*, 601 F.2d 1028, 1032-35 & n.7 (9th Cir. 1979); *Rubio de Cachu* v. *INS*, 568 F.2d 625, 627 (9th Cir. 1977); *Pilapil* v. *INS*, 424 F.2d 6, 9 (10th Cir.), *cert. denied*, 400 U.S. 908, 91 S.Ct. 752, 27 L.Ed.2d 147 (1970); *Te Kuei Liu* v. *INS*, 483 F.Supp. 107, 108 (S.D.Tex.1980) (restating earlier unpublished findings); *Shodeke* v.

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[2] Both *Foti*, 375 U.S. at 227 n.14, 84 S.Ct. at 313 n.14, and *Cheng Fan Kwok*, 392 U.S. at 216 n.16, 88 S.Ct. at 1976 n.16, declined to pass on the pendent jurisdiction of courts to review determinations not made in a section 242(b) proceeding. *See* Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals*, 65 Va.L.Rev. 403 (1979). Here, however, that question is not presented as we hold that the congressional disapproval is directly reviewable under section 106.

Attorney General, 391 F.Supp. 219 (D.D.C. 1975); *Riva* v. *Attorney General*, 377 F.Supp. 1286, 1288 (D.D.C.1974) (per curiam) (three-judge court). *But see Andres* v. *INS*, 460 F.2d 287 (6th Cir. 1972).

Indeed, amici's argument would produce untenable results. Their argument is that deportable aliens could only raise the unconstitutionality of the INA in separate proceedings in district courts. But *Riva* v. *Attorney General, supra*, is directly contrary. There, an alien appealed only his deportability determination to the circuit court and later challenged the INA's constitutionality in district court. The three-judge court found that section 106 vested in the circuit courts the exclusive jurisdiction to determine the INA's constitutionality. It stated that Riva's "failure to timely raise these issues cannot negate [section 106's] exclusive jurisdictional grant," and dismissed the action. Thus, were we to adopt amici's construction, aliens subject to deportation could never raise the constitutionality of the INA, a result that we decline to adopt. *See Johnson* v. *Robison*, 415 U.S. 361, 366-74 & n.8, 94 S.Ct. 1160, 1165 & n.8, 39 L.Ed.2d 389 (1974). Section 106 thus gives us jurisdiction to decide Chadha's claim.

B. *Justiciability*

Amici next contend that Chadha's claim is nonjusticiable. Specifically, they allege that Chadha does not have standing, that his case presents a political question, and that, since the INS has agreed that section 244(c)(2) is unconstitutional, his case lacks the necessary adverseness. We address each of these claims in turn.

1. Standing

The "case or controversy" requirement of article III is satisfied when a party demonstrates "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. . . ." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 79, 98 S.Ct. 2620, 2633, 57 L.Ed.2d 595 (1978). Further, the Court has stated that "parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Buckley* v. *Valeo*, 424 U.S. 1, 12 n.10, 96 S.Ct. 612, 631 n.10, 46 L.Ed.2d 659 (1976) (per curiam). Against this background, amici attack Chadha's standing on three fronts. They claim that Chadha has suffered no injury in fact, that he is asserting a nonjusticiable generalized government grievance, and that he is impermissibly asserting the rights of others.

While amici's claim that Chadha has not suffered an injury in fact may seem odd, inasmuch as Chadha is here contesting his deportation, amici argue that the INA subsection that Chadha attacks is part of an indivisible and unseverable whole. In other words, they argue that Chadha's attack on section 244(c)(2) necessarily includes an attack on all of section 244. This is relevant, they claim, because Chadha's deportation was suspended pursuant to section 244(a), and if all of section 244 is invalidated, there would then be no authority for the Executive's discretionary grant of suspension, and he would be deportable in any event. Amici conclude that if Chadha succeeds, we must invalidate the very section which allows him to remain in this country. It is argued that without such authority, Chadha must be deported re-

gardless of our result and, therefore, he suffers no injury in fact.

In considering the general principle of severability, the Supreme Court has said:

> Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Buckley v. *Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (per curiam) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)). In addition, where Congress has enacted a severability clause, the Court has stated:

> This provision reverses the presumption of inseparability [and] establish[es] the opposite presumption of divisibility. Congress has thus said that the statute is not an integrated whole. . . . On the contrary, when the validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced.

Electric Bond & Share Co. v. *SEC*, 303 U.S. 419, 434, 58 S.Ct. 678, 683, 82 L.Ed. 936 (1938). *See also United States* v. *Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968); *Pearce* v. *Wichita County*, 590 F.2d 128, 131-32 (5th Cir. 1979).[3]

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[3] In *Jackson*, the Court held that, notwithstanding the absence of a severability clause, the death penalty provision of the Federal Kidnaping Act was severable from the rest of the Act. It reaffirmed *Champlin*: the severability of a statute turns on congressional intent. *See also Sloan* v. *Lemon*, 413 U.S. 825, 834, 93 S.Ct. 2982, 2987, 37 L.Ed.2d 939 (1973);

Here, Congress has enacted a severability clause. Section 406 of the INA states that "[i]f any particular provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby." Thus, those who seek to establish inseverability bear the burden, under *Electric Bond & Share Co., supra,* to demonstrate that "it is evident" that Congress "would not have enacted those provisions within its power" without section 244(c)(2). *Champlin Refining Co., supra.*

This burden has not been met. At most, amici's citation to the many Immigration and Nationality Act amendments shows that when the several Congresses were presented with the question of the Attorney General's discretion, they preferred to retain some supervisory power, rather than relinquish it. It has not, however, been shown that the rest of section 244 is not "functionally independent," *United States* v. *Jackson,* 390 U.S. at 586, 88 S.Ct. at 1218, or that a "total frustration" of Congress' basic purpose would attend section 244(c)(2)'s invalidation. *Id.* at 591, 88 S.Ct. at 1221. Indeed, the legislative history of the INA's predecessor, which first gave the Attorney General discretion to suspend deportation, indicates that section 244's purpose was to alleviate the onerous

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Tilton v. *Richardson,* 403 U.S. 672, 683-84, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971) (plurality opinion); *Millstone* v. *O'Hanlon Reports, Inc.,* 528 F.2d 829, 832 n.3 (8th Cir. 1976); *Moore* v. *Fowinkle,* 512 F.2d 629, 632 (6th Cir. 1975). *Electric Bond* establishes a guide for ascertaining congressional intent. If Congress included a severability clause, it is presumed to have intended each section of the Act to stand or fall on its own.

burden of numerous private bills. Representative Dies then stated:

> It was my original thought that the way to handle all these meritorious cases was through special bills. I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through special bills. We had a demonstration of that fact not long ago when 15 special bills were before the House. The House consumed 5½ hours considering four bills and made no disposition of any of these bills.

81 Cong.Rec. 5542 (1937). Congress' objective of reducing its private bill docket will not be frustrated by ruling section 244(c)(2) invalid; Congress will not now be required to entertain numerous private petitions.

Further, contrary to amici's assertions, section 244(a) operates independently of section 244(c)(2), thus buttressing our analysis of congressional intent. Section 244(a) states, in relevant part, that "[a]s hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence [for all aliens meeting the provisions of either section 244(a)(1) or section 244(a)(2)]." Fairly read, this section gives the Attorney General the power to adjust the status of the alien. The section's first clause merely places conditions on the exercise of that discretion: subsection (c) and its mechanism of congressional disapproval is grouped with other provisions, some of which are plainly nonessential, regulating the At-

torney General's discretion.[4] It is significant, and fatal to amici's argument, that section 244(a) stands independently of these latter conditions, and operates on its own terms. Section 244(c)(2) is properly understood as one of many conditions on the Attorney General's discretion; it is not, as amici urge, an essential condition on the delegation of that authority.[5]

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[4] Subsections (b) through (f) restrict the Attorney General's discretion in the following ways: subsection (b) limits the definition of continuous physical presence; subsection (c) is the congressional disapproval mechanism; subsection (d) directs the Attorney General to adjust the nonpreference immigrant visas for each cancellation of deportation; subsection (e) grants to the Attorney General the discretion to allow deportable aliens to leave voluntarily if they meet specified conditions, and subsection (f) specifically exempts certain classes of aliens from the discretionary relief provided in subsection (a).

Each of these subsections seeks to limit the Attorney General's discretion, but this does not establish that each is somehow essential to Congress' purpose. From a reading of the section, and given the purpose of alleviating the number of cumbersome private bills, it is obvious that Congress enacted each subsection in order to further what it thought to be the proper handling of hardship cases; it is not evident that each subsection, and more particularly subsection (c), was absolutely necessary to the attainment of that goal.

[5] *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), which held that a one-house disapproval provision was inseparable from the rest of the Federal Salary Act of 1967, is thus distinguishable. The court in *McCorkle* construed a statute which, unlike the one at issue here, did not contain a severability clause. Thus, the burden was on McCorkle to show that the section he attacked was severable. Further, the court felt that the section under attack there was fairly essential to the attainment of Congress' purpose. *But see Atkins* v. *United States*, 556 F.2d 1028, 1083-89 (Ct.Cl. 1977) (en banc) (Skelton, J., dissenting) (finding same section sever-

We thus find that Chadha has indeed suffered injury in fact: the Attorney General will deport him should his challenge fail.[6] Further, Chadha can di-

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able), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978). In *McCorkle* the court marshalled explicit statements from the legislative history that the bill would not be enacted without the one-house disapproval device. Here, by contrast, amici have not shown us any statements that the one-house disapproval mechanism is essential to the legislative purpose; indeed, they have led us to statements that the basic purpose was the lightening of Congress' workload. Against such a background, we cannot say that section 244 (c) (2) was so essential to Congress' purpose that its invalidation will totally frustrate the statute's objective.

[6] While this petition was pending, Chadha has married an American citizen. This makes him eligible for an immediate relative petition, INA §§ 201(b), 204, 8 U.S.C. §§ 1151(b), 1154 (1976), but such eligibility does not make the case moot. The Attorney General has declared an intention to deport Chadha; the marriage does not alter this intention. *Cf. New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 580-81, 99 S.Ct. 1355, 1362, 59 L.Ed.2d 587 (1979) (statutory amendment arguably superseding challenged regulation does not render appeal moot when application and interpretation of amendment uncertain).

We note, moreover, that filing an immediate relative petition does not ensure certain and permanent relief. INA §§ 204, 205, 8 U.S.C. §§ 1154, 1155 (1976). *Compare Menezes* v. *INS*, 601 F.2d 1028 (9th Cir. 1979) *with Dabaghian* v. *Civiletti*, 607 F.2d 868 (9th Cir. 1979). Thus, Chadha's marriage confers neither permanent resident status nor a guarantee thereof. Until an immdiate relative petition is filed, Chadha remains subject to a final order of deportation. The dispute remains as a case or controversy.

Even if it were appropriate to assume, *arguendo*, that the INS would eventually grant Chadha's wife's petition—a petition which has not yet been, and may not be made—the case would not be moot. A case does not become moot during appeal so long as a party retains a personal stake in the appeal's outcome. *Powell* v. *McCormack*, 395 U.S. 486, 495-500,

rectly trace his deportation to the operation of section 244(c)(2). Thus, if section 244(c)(2) is in-

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89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969); *Jones* v. *Diamond*, 594 F.2d 997 (5th Cir. 1979); *McLaughlin* v. *Hoffman*, 547 F.2d 918 (5th Cir. 1977); *Carter-Wallace, Inc.* v. *Otte*, 474 F.2d 529, 532-34 (2d Cir. 1972) (Friendly, J.), *cert. denied*, 412 U.S. 929, 93 S.Ct. 2753, 37 L.Ed.2d 156 (1973). *See also Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 100 S.Ct. 2177, 64 L.Ed.2d 804 (1980) (disposition of litigant's substantive claim in class action suit does not destroy personal stake in outcome of class certification); *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (same). Chadha would suffer significant collateral detriment should we relegate him to the relief afforded by the immediate relative petition. The most obvious detriment is that he would be required to wait longer in order to be eligible for citizenship status. Under our disposition today, Chadha's status as a legal resident will have commenced when he received the initial grant of administrative suspension. Inasmuch as Chadha's deportation was suspended in 1974, the five-year waiting period for citizenship has already expired, thus making Chadha eligible to apply for naturalization. *See* 8 U.S.C. § 1427(a) (1976) (five-year period for citizenship). Under an immediate relative petition, however, Chadha could not gain permanent resident status until and unless that petition might be granted, and three more years would have to pass before Chadha might file for citizenship. *See* 8 U.S.C. § 1430(a) (1976). By this difference in dates when permanent resident status is granted, Chadha thus retains a personal interest in the disposition of this petition, even though an immediate relative petition may ostensibly grant similar relief. *Cf. Fiswick* v. *United States*, 329 U.S. 211, 222, 67 S.Ct. 224, 230, 91 L.Ed. 196 (1946) (appeal of conviction not rendered moot by petitioner's having served sentence because conviction may impede petitioner should he apply for naturalization). In addition, a case is not rendered moot simply because there is the bare possibility, or even probability, that the outcome of a separate administrative proceeding may grant the litigant identical or similar relief. *Sierra Club* v. *Train*, 557 F.2d 485 (5th Cir. 1977); *Consumers Union* v. *Miller*, 84 F.R.D. 240 (D.D.C. 1979).

validated, the original suspension under section 244(a) will be reinstated and Chadha's status adjustment will become permanent. With this additional showing that "the judicial relief requested will . . . redress the claimed injury," *Duke Power Co.*, 438 U.S. at 79, 98 S.Ct. at 2633, Chadha has made out an articie III case or controversy.

Amici argue, however, that various prudential doctrines of standing preclude us from deciding Chadha's case. Specifically, they contend that Chadha asserts "a generalized grievance shared by a large number of citizens in a substantially equal measure," *Duke Power Co.*, 438 U.S. at 80, 98 S.Ct. at 2634; *United States* v. *Richardson*, 418 U.S. 166, 175, 94 S.Ct. 2940, 2945, 41 L.Ed.2d 678 (1974), and that his claim to relief impermissibly rests on "the legal rights or interests of third parties." *Duke Power Co.*, 438 U.S. at 80, 98 S.Ct. at 2634; *Warth* v. *Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). We reject both claims.

While it may be true that Chadha asserts a claim common to all citizens interested in separation of powers, it is true only in a trivial sense. He also has the added motive, crucial to a sharp presentation of the issues, of being injured by the operation of the statute he challenges. *See Warth* v. *Seldin*, 422 U.S. at 501, 95 S.Ct. at 2206. Since the Attorney General will deport Chadha pursuant to section 244(c)(2) unless we rule in Chadha's favor, it is easily seen that Chadha's claim "is not a generalized grievance. Instead . . . it focuses on a particular [statute] and is not dependent on speculation about the possible actions of third parties not before the court." *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264, 97 S.Ct. 555, 562, 50 L.Ed.2d 450 (1977). Chadha's claim is thus specific and con-

crete: his injury stems directly from the operation of the statute he challenges. His injury presents the necessary "actionable causal relationship." *Id.*; *Warth* v. *Seldin*, 422 U.S. 490, 507, 95 S.Ct. 2197, 2209, 45 L.Ed.2d 343 (1975). It is immaterial that his claim of section 244(c)(2)'s unconstitutionality is shared by many; he presents a specific instance of injury flowing directly from the statute's operation. In a separation of powers claim, this type of concrete injury is sufficient for standing purposes. *Buckley* v. *Valeo*, 424 U.S. 1, 12 n.10, 96 S.Ct. 612, 631 n.10, 46 L.Ed.2d 659 (1976) (per curiam).

Amici's third party standing claim fails for similar reasons. Amici claim that, by asserting invalidity under a separation of powers rubric, Chadha is actually asserting the rights of the Executive and Judicial branches. This argument, however, simply proves too much. If taken to its limit, no individual could ever challenge a congressional act using a separation of powers argument. Our constitutional history, however, is contrary. *See, e.g., Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 441-43, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867 (1977); *Buckley* v. *Valeo*, 424 U.S. at 119-24, 96 S.Ct. at 682. Thus, by demonstrating a concrete injury—deportation—flowing from section 244(c)(2)'s operation, and by showing that this court could redress that injury, Chadha has established standing to challenge section 244(c)(2). *Buckley* v. *Valeo*, 424 U.S. at 12 n.10, 96 S.Ct. at 631 n.10; *Warth* v. *Seldin*, 422 U.S. at 501, 95 S.Ct. at 2206.

2. Political Question

Amici's next claim focuses not on Chadha's personal stake, but on the nature of his claim. Their contention is that Chadha's claim presents a non-

justiciable political question. At first glance, this argument may appear to have merit: the Naturalization Clause, U.S.Const. art. I, § 8, cl. 4, when read in conjunction with the Necessary and Proper Clause, U.S.Const. art. I, § 8, cl. 18, gives Congress considerable power over aliens. *See, e. g., Fiallo* v. *Bell*, 430 U.S. 787, 792-95, 97 S.Ct. 1473, 1477, 52 L.Ed.2d 50 (1977). This discretion, while broad, is not unlimited. *See* L. Tribe, American Constitutional Law § 5-16, at 281-82 (1977). But Chadha's claim is not that Congress has violated either the Naturalization or the Necessary and Proper Clauses; his claim is that section 244(c)(2) violates the separation of powers doctrine. As this doctrine is not textually committed to any one branch, the political question doctrine is not implicated. *Powell* v. *McCormack*, 395 U.S. 486, 519-20, 89 S.Ct. 1944, 1962, 23 L.Ed.2d 491 (1969); *Baker* v. *Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). Indeed, courts have often adjudicated separation of powers claims. *See, e. g., Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam); *Atkins* v. *United States*, 556 F.2d 1028 (Ct.Cl.1977) (per curiam) (en banc), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978).[7]

A more fundamental reason, however, underlies our conclusion that this case does not present a political

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[7] *Fiallo* v. *Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), is not contrary. There, a challenge was made to Congress' classification scheme for immigration preferences. The Court held that the petitioner's equal protection and due process claims were justiciable. *Id.* at 792 & 793 n.5, 97 S.Ct. at 1447 & 1448 n.5.

question. The Supreme Court has explicitly recognized that the political question doctrine is based on a judicial recognition of the principle of separation of powers. *Gilligan* v. *Morgan*, 413 U.S. 1, 10-11, 93 S.Ct. 2440, 2445, 37 L.Ed.2d 407 (1973); *Powell* v. *McCormack*, 395 U.S. at 517, 89 S.Ct. at 1961. It would stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle. It is the Judiciary's prerogative, after a showing that the source of a claimant's appeal is not textually committed to another branch, to adjudicate a claimed excess by a coordinate branch of its constitutional powers. In this case, Chadha suffers injury due to the operation of a statute he claims violates the separation of powers principle. This type of claim is subject to judicially manageable standards, *see, e. g., Buckley* v. *Valeo*, 424 U.S. at 119-24, 96 S.Ct. at 682, and we therefore reject amici's claim.

3. Adverseness

Amici's final point is that Chadha's claim presently lacks the necessary adverseness. They argue that since the INS has agreed that section 244(c)(2) is unconstitutional, we should decline to pass on Chadha's case. This argument misconceives the adverseness requirement. The controversy "must be a real and substantial [one] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). Here, Chadha has asserted a concrete controversy, and our decision

will have real meaning: if we rule for Chadha, he will not be deported; if we uphold section 244(c)(2), the INS will execute its order and deport him. Courts often, moreover, adjudicate disputes in which legal or factual matters are conceded.[8] In *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9, 88 S.Ct. 1970, 1973 n.9, 20 L.Ed.2d 1037 (1968), for example, the INS also agreed with the alien's interpretation of the case's dispositive issue. Yet, the Court asked Congress to appear as amici, as we have done, and heard the case on the merits. Similarly, in *Atkins* v. *United States*, 556 F.2d at 1058 & n.15, the Justice Department agreed with the plaintiffs that a one-house disapproval mechanism was unconstitutional. The Court of Claims, however, heard the case on the merits after requesting both houses of Congress to appear as amici. *Id.*

Finally, if we accepted amici's argument and dismissed the appeal for lack of adversity, we would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional. Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dis-

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[8] The Supreme Court has often recognized the presence of a case or controversy irrespective of a party's concessions. *See, e.g., Sibron* v. *New York*, 392 U.S. 40, 58, 88 S.Ct. 1889, 1900, 20 L.Ed.2d 917 (1968); *Levine* v. *United States*, 383 U.S. 265, 266, 86 S.Ct. 925, 15 L.Ed.2d 737 (1966); *Cates* v. *Haderlein*, 342 U.S. 804, 72 S.Ct. 47, 96 L.Ed. 609 (1951) (per curiam); *Young* v. *United States*, 315 U.S. 257, 258-59, 62 S.Ct. 510, 511, 86 L.Ed. 832 (1942). *See also Atkins* v. *United States*, 556 F.2d 1028, 1058 & n.15 (Ct.Cl. 1977) (per curiam) (en banc), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978).

miss the appeal and thereby permit the order to be enforced on such grounds.[9]

Against this background, and with arguments for the constitutionality of the statute ably advanced by amici, we find that the issues are presented in a sufficiently concrete and specific manner for us to reach the merits of the case.

II. Merits

A. *Separation of Powers as a Legal Standard*

Executive or legislative actions which contravene the principle of separation of powers are unconstitutional. *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 441-46, 97 S.Ct. 2777, 2789, 53 L.Ed.2d 867 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 118-24, 96 S.Ct. 612, 681-84, 46 L.Ed.2d 659 (1976) (per curiam); *United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). We conclude the statutory mechanism reviewed here violates the constitutional doctrine of separation because it is a prohibited legislative intrusion upon the Executive and Judicial branches.

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[9] Amici argue for the absence of a case or controversy because they cannot petition the Supreme Court for a writ of certiorari. *See Ex parte Leaf Tobacco Board*, 222 U.S. 578, 581, 32 S.Ct. 833, 56 L.Ed. 323 (1911). In *United States* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), however, a congressional act was also challenged. There, the Solicitor General conceded two of the three issues and expressed no opinion on the third. *Id.* at 305, 66 S.Ct. at 1073. Congress then authorized a special prosecutor to petition for a writ of certiorari. *Id.* at 306, 66 S.Ct. at 1074. The Supreme Court found the requisite case or controversy was not absent and heard the case on the merits.

We explain in detail our reasons for that conclusion, but preface our discussion by a consideration of some elementary principles. This is necessary because no circuit or Supreme Court authority we have found [10] holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the powers upon another branch with great specificity.[11] Given this background, the gravity of our conclusion requires us to consider the pertinent first principles of the Constitution in detail.

The most recent Supreme Court case declaring that a legislative action violated the separation of powers doctrine was *Buckley* v. *Valeo*. The Supreme Court there restated the separation of powers doctrine as a rule of general application, but found also that the statute in question violated the explicit constitu-

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[10] *Cf. Atkins* v. *United States*, 556 F.2d 1028 (Ct.Cl. 1977) (per curiam) (en banc) (legislative disapproval device in federal salary statute constitutional), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *State* v. *A. L. I. V. E. Voluntary*, 606 P.2d 769 (Alas. 1980) (legislative veto violates state constitution). For a balanced and comprehensive discussion of the problem of which this case presents one facet, see Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?* 56 N.C.L.Rev. 455 (1978), and McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum.L.Rev. 1119, 1133-62 (1977). Many other academic essays, too numerous to list here, are cited in Henry, *The Legislative Veto: In Search of Constitutional Limits*, 16 Harv.J.Legis. 735, 737 n.7 (1979); various authors there cited are affiliated with one side or another in the debate on the legislative veto.

[11] The allocation of powers among the three branches is general in its terms but comprises an explicit textual recognition of the separation of powers principle. *See* U.S.Const., art. I, § 1, cl. 1; *id.*, art. II, § 1, cl. 1; *id.*, art. III, § 1, cl. 1.

tional provision that comprises the appointment power, U.S.Const., art. I, § 2, cl. 2. *See also Myers* v. *United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926). In this case the concern is whether the legislature has undertaken to exercise a power necessarily but implicitly conferred elsewhere by the nature of an institutional government; power such as the executive authority faithfully to execute the laws, U.S. Const., art. II, § 3, and the judicial power to determine cases or controversies, *id.*, art. III, § 2. To support our conclusion that this statute violates the rule of separation of powers by usurping a necessary power of another branch, we must examine the purpose and function of the constitutional doctrine, particularly as it pertains to the boundaries of legislative authority.

The Supreme Court has placed it beyond dispute that the doctrine of separation of powers is vital for constitutional government. *See Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 441-46, 97 S.Ct. 2777, 2789-91, 53 L.Ed.2d 867 (1977); *id.* at 491-92, 97 S.Ct. at 2813 (Blackmun, J., concurring in part and concurring in the judgment); *id.* at 492-504, 97 S.Ct. at 2813-2820 (Powell, J., concurring in part and concurring in the judgment); *id.* at 504-20, 97 S.Ct. at 2820-29 (Burger, C.J., dissenting); *id.* at 545-61, 97 S.Ct. at 2841-49 (Rehnquist, J., dissenting); *Buckley* v. *Valeo*, 424 U.S. 1, 118-24, 96 S.Ct. 612, 681-84, 46 L.Ed.2d 659 (1976) (per curiam); *id.* at 284-86, 96 S.Ct. at 757-58 (White, J., concurring in part and dissenting in part). As James Madison affirmed in the beginning, the separation of powers concept is neither doctrinaire nor rigid.[12] In

[12] The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or

part for that reason, the Court's specific discussions of the principle's meaning are a cautious balance of antinomies.

> [A]ll of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the

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> many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct.
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> From these facts by which Montesquieu was guided it may clearly be inferred, that in saying "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.

The Federalist No. 47 (J. Madison) at 324-26 (J. Cooke ed. 1961).

> National Government be largely separate from one another.
>
> Yet it is also clear . . . that the Constitution by no means contemplates total separation of each of these three essential branches of Government . . . . The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Buckley, 424 U.S. at 120-21, 96 S.Ct. at 682-83. The doctrine is at once pervasive and fluid, and of necessity there will be instances where the proper means for its enforcement rest with the mutual respect that each branch of the Government must extend to the others. At one end of the continuum the doctrine is a self-enforcing rule, one of political comity. There remain, nevertheless, cases in which transgressions are more patent. In these instances it is the duty of the Judicial Branch to resolve disputes with or among the other component parts of the Government. *Youngstown Sheet & Tube Co.* v. *Sawyer*; *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803). This is true both in those cases in which the affected branches have taken a position in the precise dispute before the court, *see, e. g.*, *Nixon* v. *Administrator of Gen. Servs.*; *Buckley* v. *Valeo*, and those in which a private litigant is, in part, a surrogate for a branch whose powers have been usurped, *see, e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*. In the latter case, the private person also asserts a

separate and personal legal interest, namely, that the exercise of governmental powers exceeds constitutional bounds and is therefore an unlawful invasion of individual rights. Chadha's case falls into this last category.

An explanation of the purposes and dynamics of the separation of powers rule will assist in understanding the standard we formulate for its application. Although an exhaustive historical study of the doctrine is not practical here,[13] two principal purposes can be identified. The doctrine's first purpose is to prevent an unnecessary and therefore dangerous concentration of power in one branch. Thomas Jefferson wrote that the basis of all free governments was that "the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others." [14] James Madison and Justice Brandeis have written notable formulations of this theory:

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[13] The following provide historical background on the separation of powers doctrine: Legislative Reference Service of the Library of Congress, Separation of Powers and the Independent Agencies: Cases and Selected Readings, Prepared for the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, S. Doc. 91-49, 91st Cong., 1st Sess. (1969); G. Wood, The Creation of the American Republic 1776-1787, at 150-61, 446-53, 547-53, 602-06, 608 (Norton ed. 1972); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L.Rev. 449 (1958); Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U.Chi.L.Rev. 385 (1935); Wright, *The Origins of the Separation of Powers in America*, 13 Economica 169 (1933).

[14] T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1955).

> This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

The Federalist No. 51 (J. Madison) at 349 (J. Cooke ed. 1961).

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. *United States*, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting).[15] In addition, there is respected contemporary support for this historical interpretation. *See, e. g.*, G. Wood, The Creation of the American Republic 1776-1787, at 150-61, 446-53, 547-53, 602-06, 608 (Norton ed. 1972).

The goal of preventing undue concentrations of power is furthered by the natural tendency of each

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[15] *See also* Sharp, *supra* note 13 at 407.

center of power to compete to enlarge or maintain its own influence. The net effect is to deter any one branch from attaining hegemony. An undue concentration of authority in one branch inevitably causes structural decomposition of the other branches, along with a dispersion of their original powers. This idea preceded the revolution and is found in Blackstone's discussion of Parliament:

> In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England, this supreme power is divided into two branches; the one legislative, to wit, the Parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone.

1 W. Blackstone, Commentaries * 146-47. *See also id.* at * 269-70 (discussion of executive and judicial powers). If the doctrine is given this competitive cast, it might be implied that the proper remedy for a violation lies in the branch encroached upon. Under this view one could argue that an executive agency can defy an attempt by another branch to exercise

a prerogative of the former.[16] Even from the standpoint of abstract logic, however, this solution is not sound because stalemate is the end result, and certainly our constitutional tradition is otherwise. In the most sensitive of cases the Judiciary has adjudicated competing claims and the affected branch has complied. *See United States* v. *Nixon*; *Youngstown Sheet & Tube Co.* v. *Sawyer*; *Humphrey's Executor. Cf. Ex parte Merryman*, 17 Fed.Cas. 144 (C.C.D.Md. 1861) (writ of habeas corpus suspended in wartime).

The framers had a second motive for adopting the principle of separation of powers. The doctrine serves also as a practical measure to facilitate administration of a large nation by the assignment of numerous labors to designated authorities. Thomas Jefferson made this point in some detail:

> I think it very material to separate in the hands of Congress the Executive & Legislative powers, as the Judiciary already are in some degree. This I hope will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, & takes place of everything else. Let any man recollect, or look over, the files of Congress, he will observe the most important propositions hanging over from week to week & month to month, till the occasions have past them, & the thing never done. I

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[16] *See, e.g.*, Hearings Before the Subcomm. on Elementary, Secondary, & Vocational Educ. of the House Comm. on Educ. & Labor, 96th Cong., 2d Sess. (Sept. 18, 1980) (regarding Secretary of Education's disregard of legislative disapproval).

> have ever viewed the executive details as the greatest cause of evil to us, because they in fact place us as if we had no federal head, by diverting the attention of that head from great to small objects.

4 T. Jefferson, The Writings of Thomas Jefferson 424-25 (P. Ford ed. 1894) (Letter to E. Carrington, Aug. 4, 1787).

There are two respects in which the separation of powers doctrine enhances the responsible autonomy of each branch and thereby the efficiency of the government as a whole. The doctrine protects the Legislative branch, for example, from cumbersome entanglement in the myriad instances of execution of its laws and policy. Certain efficiencies of administration can be achieved, moreover, only by a distribution of the government's powers.[17] The concern for the autonomy of each branch is shown by a corollary of the separation doctrine, namely, the rule against undue delegation of powers. Just as the separation of powers prohibits the accumulation of too much power in one branch, the nondelegation doctrine prevents one branch from abrogating its authority in a wholesale and standardless manner.[18]

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[17] *See, e.g.*, Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 Ark.L.Rev. 583, 587 (1973).

[18] For discussion of the relation between the principles of separation of powers and of nondelegation, see L. Jaffe, Judicial Control of Administrative Action 28-86 (1965); McGowan, *supra* note 10; note 33 *infra* (relation between nondelegation rule and permissible extent of shared administration).

Courts cannot, however, parse every allocation of power under the separtion doctrine. We are not the ideal arbiters of efficient administration in many instances because we are not constituted to choose and to apply optimal theories of political and organizational science applicable to the routine operation of the Government. An examination of the many instances in which strict separation is not observed, cases both actual and conceivable, shows at one extreme a mere tinkering with the balance, of limited scope or temporal duration, growing out of a great practical necessity, and presenting a realistic threat neither to individual liberty nor to the orderly functioning of a coordinate branch. An example approved in the case law is the congressional prerogative to grant standing to persons otherwise barred by internal prudential rules developed by the courts to govern litigation before them. *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.E.2d 343 (1975).

There are, nevertheless, other instances in which judicial action is required to correct constitutional violations. In contrast to temporary, necessary, and minor departures from the norm, there are departures that are axiomatically unconstitutional, departures which undermine both the purpose mutually to check component powers and that to promote government efficiency. Examples would be an attempt by the Executive to enact a federal criminal code without congressional approval, or an attempt by Congress to exercise the prosecutorial and adjudicative responsibilities of enforcing the criminal law. No doubt all would agree that these schemes would violate the Constitution.[19]

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[19] John Adams described the havoc such a scheme would wreak:

In the amorphous expanse between these poles, however, there will be certain accommodations not admitting of judicial arbitration because the only considerations are ones of organization not implicating a suspect form or degree of power. It follows from

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> The next inquiry is, concerning the administration of justice. Shall every criminal be brought before this assembly and tried? Shall he be there accused before five hundred men? witnesses introduced, counsel heard? This again would take more than the whole year; and no man, after all, would consider his life, liberty, or property, safe in such a tribunal. These all depend upon the disquisitions of the counsel, the knowledge of the law in the judges, the confrontation of parties and witnesses, the forms of proceedings, by which the facts and the law are fairly stated before the jury for their decision, the rules of evidence, by which the attention of the jury is confined to proper points, and the artifices of parties and counsel avoided. An assembly of five hundred men are totally incapable of this order, as well as knowledge . . . .
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> Will it be said that the assembly shall appoint committees to try causes? But who are to make these appointments? Will not a few haughty palatines in the assembly have influence enough to determine the election in favor of their friends? and will not this make the judges the tools of a party? If the leaders are divided into parties, will not one prevail at one year, and another the next? and will not this introduce the most wretched of servitudes, an uncertain jurisprudence?

1 J. Adams, A Defence of the Constitutions of Government of the United States of America 375-76 (London ed. 1794), *reprinted in* 4 J. Adams, Works of John Adams 583-84 (C. Adams ed. 1851). *See generally*, L. Jaffe, Judicial Control of Administrative Action 28-33 (1965). For a discussion of the distinction between essential and incident powers in a similar context, see Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 Law & Contemp. Prob. 102 (Spring 1976).

the various practical purposes served by the principle that separation of powers is not an inflexible rule, but one that governs a broad continuum of the various admixtures of powers, some permissible. As Mr. Justice Jackson stated: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 635, 72 S.Ct. at 870 (Jackson, J., concurring). Consonant with that view, the courts interpret separation of powers questions pragmatically, in order to preserve the essential design of the Constitution without imposing unworkable limitations.[20] We must acknowledge in this regard the primacy of the Legislative branch in organizing the Government as evidenced by its constitutional right to create positions in the Executive branch, U.S.Const. art. II, § 2, cl. 2, and to create the structure of the courts, *id.* art. I, § 8, cl. 9. Professor, later Justice, Frankfurter, explained this point.

> The accommodations among the three branches of the government are not automatic. They are undefined, and in the very nature of things could not have been defined, by the Constitution. To

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[20] This does not mean that "we are dealing with . . . a 'political doctrine,' and not a technical rule of law." Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv.L.Rev. 1010, 1014 (1924) (footnote omitted). If this were true, all statutory alterations of a hypothetical norm of allocated powers might be unassailable, absent an explicit constitutional limitation in the particular power involved. We do not think the doctrine is quite so fluid.

> speak of lines of demarcation is to use an inapt figure. There are vast stretches of ambiguous territory. Certainly in the first instance Congress must mark metes and bounds.[21]

In response, it must further be acknowledged that the existence of "vast stretches of ambiguous territory" does not preclude the existence of other zones of power that are judicially ascertainable. These latter instances, in which the arrogation of excess and unwonted power is radical and unambiguous, comprise the occasions when a court must act to maintain the constitutional design.

We come then to define the judicial standard governing whether an attempted exercise of authority by one branch contravenes the rule of separation of powers. The twin purposes of preventing concentrations of power dangerous to liberty and of promoting governmental efficiency are served if we define a constitutional violation of the separation of powers as an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government. *See Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977). If an exercise of functions which lie at the center of another branch is attempted on a long-term and routine basis, a violation of the constitutional rule requiring separation of powers is more easily established. Before we determine whether the congressional disapproval device here reviewed violates the standard we have set forth, it is necessary

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[21] Frankfurter & Landis, *supra* note 20, at 1016.

to examine in detail the statutory duties Congress has required the Executive and Judiciary to perform.

B. *The Process for Suspension of Deportation*

Until 1940 deportation of aliens illegally within the United States was mandatory. The strict rule produced harsh results in many cases. Hardships were exacerbated after the adoption in 1924 of permanent numerical restrictions on immigrations and the repeal of statutes of limitation for the deportation of those who had entered the United States illegally.[22] The suffering caused by these laws led to urgent requests for reform. Congress responded to these requests by passing the Alien Registration Act of 1940, ch. 439, 54 Stat. 670 (1940). The Act authorized the Attorney General to suspend deportation in certain categories on grounds of extreme hardship. The Attorney General was required to report each suspension to Congress, which reserved the right to disapprove suspension by a vote of both House and Senate. In 1952 the Congress enacted the Immigration and Nationality Act (INA).[23] In section 244(c)(2) the Con-

[22] Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924).

[23] Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). Although President Truman vetoed the Act, his veto message did not specifically focus on the one-house disapproval provision of section 244(c)(2). However, the Report of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome 213-14 (1953), expressed the view that that provision "is contrary to our fundamental constitutional doctrine of separation of legislative, executive, and judicial powers. [. . .] [It] is obstructive of good government and destructive of fundamental principles. In immigration matters, in particular, it frustrates proper administration and puts a premium on extraneous considerations in the determination of legal rights."

gress provided that either house acting alone could override the Attorney General's suspension of deportation.

The INA entitles an alien to a hearing on whether he is deportable. During this hearing, an alien "may apply to the special inquiry officer for suspension of deportation under section 244(a) of the Act [8 U.S.C. § 1254(a) 1976)]," 8 C.F.R. § 242.17(a) (1979); upon completion of the necessary forms, the inquiry officer receives evidence on the issues of grounds for deportability and for suspension. *Id.* § 244.1; 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure, §§ 7.9a(5), 7.9d(4), 7.9f (rev. ed. 1980). If granted, the suspension allows the Attorney General eventually to "adjust the status to that of an alien lawfully admitted for permanent residence," 8 U.S.C. § 1254 (1976). The suspension proceeding "has two phases: a determination whether the statutory conditions have been met, which generally involves a question of law, and a determination whether relief shall be granted, which [ultimately] . . . is confided to the sound discretion of the Attorney General [and his delegates]." 2 C. Gordon & H. Rosenfield, *supra*, § 7.9a(5) at 7-134.[24]

At this point, there are subclassifications for aliens, depending on the grounds for their deportability. These do not concern us. For our purposes of sketching the statutory scheme, it is important to note the following principal statutory prerequisites which, if met, entitle an alien to be considered for the discre-

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[24] The legal, as opposed to discretionary, nature of the determination of statutory eligibility may be different in the context of a petition to reopen suspension of deportation. *See, e.g., Wang* v. *INS*, 622 F.2d 1341 (9th Cir. 1980) (en banc), *petition for cert. filed*, 49 U.S.L.W. 3271 (U.S. Sept. 25, 1980) (No. 80-485).

tionary grant of suspension: period of residence in the United States, good moral character, and hardship. *See* INA § 244(a), 8 U.S.C. § 1254(a) (1976); 2 C. Gordon & H. Rosenfield, *supra*, at § 7.9d(2), (3), (5). Each of these prerequisites requires a legal determination of a traditional sort, the contents of which are explicated by an orderly history of administrative practice and judicial review and interpretation.[26] Unlike the burden on the issue of deportability, the onus is on the alien to demonstrate satisfaction of the statutory criteria.

The burden is also on the alien to demonstrate the existence of such substantial equities, above and beyond the statutory prerequisites, as should persuade the inquiry officer and the Attorney General to make the second and discretionary determination to suspend deportation. While such equities are less clearly limned by precedent than the factors governing the first half of the decision, they can be described simply and fairly as facts establishing an unusually strong showing on the first half of the decision, *e. g.*, extraordinary hardship or moral character, or evidence of such a meritorious record as a member of the community as would make the alien a desirable potential citizen. *Id.* § 7.9e, at 7-165 to 7-170.

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[26] For example, the Board of Immigration Appeals, a nonstatutory adjunct to the Attorney General's role in this scheme, has applied these specific criteria for determining whether the statutory prerequisite of hardship has been met by the alien: length of residence and family ties in the United States, the possibility of an alien's obtaining a visa abroad, and the possible weight of the burden of deportation on the alien's health, age, and finances. In re S., 5 I. & N. Dec. 409 (1953); In re U., 5 I. & N. Dec. 413 (1953). *See* 2. C. Gordon & H. Rosenfield, Immigration Law and Procedure § 7.9d(5), at 7-161 to 7-165 (rev. ed. 1980).

If these two hurdles, the satisfaction of statutory prerequisites and a favorable exercise of discretion, are cleared, a third and final one awaits. It is the one-house disapproval mechanism, described as follows:

> Reports of favorable action in suspension cases received by Congress from the Attorney General are referred to the Judiciary Committees of each House of Congress. Each committee has a staff which studies the Attorney General's report and recommends any further action that may be warranted. By agreement between the two Judiciary Committees all suspension cases are considered in the first instance by the Senate Judiciary Committee and if approved there and by the Senate (when affirmative approval is necessary) are then considered by the House Judiciary Committee. One commentator has said: "In practice, the consideration by Congress of the suspension is perfunctory and without debate, with Congressmen apparently content to rely on the recommendations of the judiciary committees, which in turn rely upon the views of their immigration subcommittees."
>
> An attorney representing the subject of a suspension of deportation referred to Congress by the Attorney General may discuss his client's case with the staff of the Judiciary Committee in which it is being considered. Usually he will be given an opportunity to present the alien's full story and to submit any new oral or written evidence, preferably accompanied by documentary proof.
>
> After submission of the case by the Attorney General, Congress can take action during the cur-

> rent session and until close of its following session.
>
> . . . Two procedures are prescribed for Congressional approval. In cases under the first category of § 244 the Attorney General's action is ratified unless either House of Congress passes a resolution of disapproval.
>
> . . . In the vast majority of cases the Attorney General's grant of suspension is approved by Congress in the manner prescribed. . . .

Id. § 7.9f, at 7-174 to 7-176 (footnotes omitted).

The substantive elements governing the suspension decision cannot be understood fully without considering the elements of standard procedure and review that constitute a final decision. Therefore, we describe the administrative procedure and judicial review mechanisms that govern section 244 proceedings until the point of congressional action.

The procedural requirements applicable to both the eligibility and discretionary parts of the suspension of deportation decision have varied over time. It is a process that has sometimes seemed nearly free of procedural restraints but which has gradually been channeled into the clearer and more regular mainstreams of administrative procedure. Although the Supreme Court held in 1950 that the requirements of the Administrative Procedure Act (APA) applied to deportation proceedings, *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616 (1950), five years later the Court held that intervening legislation was intended to exempt these proceedings from the APA's coverage by the provision of special procedures, *Marcello* v. *Bonds*, 349 U.S. 302, 305-11, 75

S.Ct. 757, 759-62, 99 L.Ed. 1107 (1955).[26] By regulation, the Attorney General has provided procedural safeguards that include the opportunity to present evidence with respect to discretionary relief and a statement of reasons for granting or denying relief. 8 C.F.R. §§ 242.17(a), 242.18(a) (1979). Even in the very limited circumstances when confidential information may be considered by the hearing officer,[27] the general nature of this information must be disclosed so that the alien may present contrary evidence. *Id.* § 242.17(a) (1979). Deportation procedures are generally consonant with the requirements of due process as set out in the APA. *Marcello* v. *Bonds*, 349 U.S. at 307-10, 75 S.Ct. at 760-61.

These procedural requirements are more fully understood in light of the standard of review applied to the record developed during the administrative proceeding,[28] and this underscores why these proceedings,

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[26] For analysis of the application of *Marcello* to discretionary relief for deportable aliens, see *Giambanco* v. *INS*, 531 F.2d 141 (3d Cir. 1976); *Cisternas-Estay* v. *INS*, 531 F.2d 155 (3d Cir.), *cert. denied*, 429 U.S. 853, 97 S.Ct. 145, 50 L.Ed.2d 127 (1976); Note, 8 Seton Hall L.Rev. 250 (1977).

[27] Although the Supreme Court has permitted consideration of confidential information in a narrow category of cases in which disclosure would threaten the national security, *see Jay* v. *Boyd*, 351 U.S. 345, 76 S.Ct. 919, 100 L.Ed. 1242 (1956), this practice has been discontinued. 2 C. Gordon & H. Rosenfield, *supra* note 25, at § 7.9f(2).

[28] There is some apparent confusion on this point. Even within this circuit, the formulation of the degree of reasonableness a denial of relief under section 244 must contain for affirmance by the Court of Appeals has ranged from no abuse of discretion, *Banks* v. *INS*, 594 F.2d 760, 762 (9th Cir. 1979), to substantial evidence, *Martin-Mendoza* v. *INS*, 499 F.2d 918, 920 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113, 95 S.Ct. 789, 42 L.Ed.2d 810 (1975). The apparent inconsistencies

in their form and their impact on individuals, incorporate significant elements of adjudication. Although judicial review of denials of suspension is governed by section 106(a) of the Act, 8 U.S.C. § 1105a(a) (1976), rather than the APA, the legislative history of section 106 indicates that the bill was intended to "implement and apply" section 10 of the APA. H.R. Rep.No.1086, 87th Cong., 1st Sess. 22 (1961), *reprinted in* [1961] U.S. Code Cong. & Ad.News 2950, 2966. The Department of Justice explained that adoption of section 106(a) would permit "[a]liens seeking review of administrative orders [to] be given full and fair opportunity to do so. . . ." Letter of Apr. 18, 1961, from B. White, Dep.Atty.Gen., to House Comm. on the Judiciary, *Id.* at 24, *reprinted in* [1961] U.S. Code Cong. & Ad.News 2968.[29] Judge Friendly has given the following explication of the courts' role in the section 244 scheme:

> Disposition of the petition requires analysis of the scope of review of orders denying suspension

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are doubtless due to a conflation of the Attorney General's legal decision on eligibility with his discretionary determination to grant relief to aliens in the eligible class.

[29] "Section 5 of this legislation establishes a judicial review proceeding precisely as is contemplated by the Administrative Procedure Act." H.R.Rep. No. 1086, 87th Cong., 1st Sess. 27 (1961), *reprinted in* [1961] U.S.Code Cong. & Ad.News 2971.

> Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges.

Id. at 28, *reprinted in* [1961] U.S.Code Cong. & Ad.News 2972.

of deportation. There is no reason to doubt that administrative findings of fact made in determining an alien's eligibility for suspension must meet the statutory test of support by "reasonable, substantial, and probative evidence on the record considered as a whole," § 106(a)(4), see *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 228-229 & n.15 [84 S.Ct. 306, 313 & n.15, 11 L.Ed.2d 281] (1963), or that a determination of ineligibility is subject to judicial scrutiny for proper application of the conditions prescribed in § 244. See *Dessalernos* v. *Savoretti*, 356 U.S. 269 [78 S.Ct. 690, 2 L.Ed.2d 751] (1958); *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812 (9 Cir. 1964); *Gagliano* v. *Immigration and Naturalization Service*, 353 F.2d 922 (2 Cir. 1965). We can narrow the problem further by accepting that factual findings on which a discretionary denial of suspension is predicated must pass the substantial evidence test. The issue concerns the standard to be applied in reviewing an ultimate refusal to exercise discretion in favor of an eligible alien when the facts are undisputed or have been properly found.

* * * * *

Without essaying comprehensive definition, we think the denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group, or, in Judge Learned Hand's words, on other "considerations that Congress could not have intended to

make relevant." *United States ex. rel. Kaloudis* v. *Shaughnessy, supra,* 180 F.2d [489] at 491.

Wong Wing Hang v. *INS,* 360 F.2d 715, 716, 719 (2d Cir. 1966) (Friendly, J.). It is clear that courts will treat section 244's statutory criteria for eligibility like any other statutory prerequisites, and reverse when they have been misapplied. *See, e.g., Prapavat* v. *INS,* —— F.2d ——, No. 79-7604 (9th Cir. Nov. 7, 1980); *Bastidas* v. *INS,* 609 F.2d 101 (3d Cir. 1979); *So Chun Chung* v. *INS,* 602 F.2d 608 (3d Cir. 1979); *Rassano* v. *INS,* 492 F.2d 220 (7th Cir. 1974); *Siang Ken Wang* v. *INS,* 413 F.2d 286 (9th Cir. 1969); *Git Foo Wong* v. *INS,* 358 F.2d 151 (9th Cir. 1966).

In fine, our detailed examination of the section 244 statutory scheme for suspension of deportation leads us to the following capsule description. Section 244 establishes criteria for a government dispensation, criteria applied by the administrative agency in an ongoing program of individual adjudicative-type determinations. Although the ultimate determination is discretionary, a fair consistency in the treatment of aliens is guaranteed, up to the point of review by Congress, by appropriate procedural safeguards. These procedures are, in turn, enforced by judicial review of various substantive and procedural aspects of the Attorney General's decision, in both its legal and discretionary phases. Finally, in cases where relief is granted, there is congressional review of the application of both the statutory and equitable criteria as they have been developed and applied by administrative and judicial interpretation. It is this last step we turn to now.

C. *The Legislative Disapproval as a Constitutional Violation*

Chadha's case presents the question whether the one-house disapproval disrupts an essential function of the judicial office or of the executive office. The test set out above for detecting a judicially correctable violation of the separation of powers rule was the assumption by one branch of an essential function of another, especially on a long-term and routine basis, if that assumption of power is both disruptive and unnecessary to the attainment of a legitimate purpose. In applying this test to section 244(c)(2), it is important to specify the precise character of the disapproval mechanism. This character is most clearly and concretely drawn by considering how one might view the impact of the disapproval on the scheme in functional terms. We consider three types of functional impact in turn. First, the disapproval could be viewed as a correction of judicial or executive misapplication of the statute, especially the eligibility criteria. Second, the device could be viewed as a means for sharing the administration of the statute with the Executive on an ongoing basis. Third, it may be argued that the disapproval is the exercise of a residual legislative power to define substantive rights under the law, an exercise falling short of statutory amendment, which would, of course, require the observance of formal constitutional procedures for legislation.

We turn first to view the legislative disapproval as a corrective device. Aliens are clearly entitled to a fair and uniform application of the statutory criteria of which the courts are the ultimate guarantor. For this reason, the neutral force of judicial review is a boon even to those aliens who are indirectly benefited

by it through the resulting uniformity of the Executive's application of the law. By assuming the task of correcting misapplications of the law, Congress is performing a role ordinarily a judicial or an internal administrative responsibility.

The duty of the Judiciary under this and numerous other statutory schemes is to determine, at the conclusion of administrative proceedings, whether the Executive branch has correctly applied the statute that establishes its authority. *See generally* L. Jaffe, Judicial Control of Administrative Action 320-94, 546-653 (1965). For instance, courts have reviewed orders of deportation and held that a brief visit to another country does not interrupt the statutory minimum period of residency prescribed for suspension of deportation.[30] The effect of section 244(c)(2) is for Congress to reserve to itself the power, by the action of one house, to determine that such a visit does interrupt the residence period. We think the supervening legislative action taken here implies a radical alteration of the role of federal courts in the field of administrative law. By reason of the congressional disapproval device, nearly all judicial interpretations of the criteria in section 244 are rendered, in effect,

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[30] *Git Foo Wong* v. *INS*, 358 F.2d 151 (9th Cir. 1966). *See also Kamheangpatiyooth* v. *INS*, 597 F.2d 1253 (9th Cir. 1979). For other examples of judicial correction of misinterpretations of the criteria used in determining eligibility, see *Posusta* v. *United States*, 285 F.2d 533 (2d Cir. 1961) (L. Hand, J.) ("good moral character" in naturalization context); *United States ex rel. Exarchou* v. *Murff*, 265 F.2d 504 (2d Cir. 1959) ("good moral character" in voluntary departure context); *United States ex rel. Giacolone* v. *Miller*, 86 F.Supp. 655 (S.D.N.Y. 1949) (same).

impermissible advisory opinions.[31] *See Hayburn's*

[31] *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 85-102 (2d ed. 1973). Similarly, if one of the allegations in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *cf. Shaughnessy* v. *Accardi*, 349 U.S. 280, 75 S.Ct. 746, 99 L.Ed. 1074 (1955) (after remand), had been true, and the alien was in fact denied discretionary relief only because he was on a secret list, one house of Congress could have disapproved any relief an administrative proceeding afforded him on remand by the use of precisely the criterion the Court ruled statutorily impermissible. This would constitute a de facto revision of the Court's statutory interpretation, by only one house.

It appears that the House in this instance did view its action as a correction of a misapplication of the statutory criteria governing eligibility for exercise of the Attorney General's discretion:

> Under that section of law, the Congress is required to review administrative decisions which have recommended the suspension of deportation of aliens who have satisfied the following statutory requirements: First, 7 years of continuous physical presence in the United States; second, good moral character during that time; and third, unusual hardship in the event of their deportation.
>
> It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended.
>
> I should emphasize that this is a disapproval resolution and unless it is adopted in this session of Congress permanent residence will be granted to these aliens named in the resolution.

121 Cong.Rec. 40,800 (1975) (Remarks of Rep. Eilberg, explaining House disapproval of suspension for Chadha and five other aliens). If Congress has the power to reserve to itself the ultimate determination of whether extreme hardship

Case, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum.L.Rev. 1119, 1161 (1977). We think this is an interference with a central function of the Judiciary, and that it is an interference which is both disruptive and unnecessary.

The congressional action is disruptive in two senses. Initially, there is a vertical disruption. The nature of the federal system is such that the national government has a direct relation of power over and protection of the persons it governs, *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 403-05, 4 L.Ed. 579 (1819), and this is true for each respective branch. Here, the Legislative branch has disrupted or severed the Judiciary's relation to the alien in a substantial way. Aliens are no longer guaranteed the constraints of articulated reasons and stare decisis in the interpretation of the Immigration & Nationality Act. Adjudications they have obtained in the Judicial branch may be set aside for any reason, or no reason at all, so that judicial decisions may be for naught. This effect, the potential nullification of judicial attempts to require uniform application of the statute by the Executive, has an indirect effect upon all aliens who must rely on an administrative application of the statute in the first instance. This vertical impact of the disapproval mechanism diminishes the strength of the Judiciary's structural check on the Executive, which is one of the twin purposes behind the separation of powers principle.[32]

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is present, decisions such as *Prapavat* v. *INS*, —— F.2d ——, No. 79-7604 (9th Cir. Nov. 7, 1980), would be mere advisory opinions.

[32] We do not believe there is any contradiction between our judgment that a final determination of the correctness of an

There is a further disruption, horizontal in its impact. On this plane the Legislature interferes with the central or essential function of coordinate branches. The Judiciary's duty to decide cases now becomes subject to review by the Legislature, thus undermining the integrity of the third branch. There are virtually no procedural constraints on the ultimate congressional decision nor any provision for review of Congress' legal or factual conclusions. We are of the view that this departure from the separation of powers norm is not necessary. There is no indication that the Judiciary is incapable of determining whether the Attorney General has abused his discretion or applied a statutory standard improperly. If there were a perceived danger that hearing officers would err by misapplying the statutory criteria in favor of the alien, provision for judicial review of suspensions of deportation would be the ordinary solution. The Legislature thus disrupts the judicial system by retaining a selective power to override individual adjudications, in lieu of changing standards prospectively by the usual, corrective device of a statutory amendment.

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application of statutory criteria to an individual case is an essential judicial function, and our observation that the law is initially applied by the Executive. When an administrative agency applies law in a quasi-judicial capacity, it does so under the constraints of due process, such as embodied in the Administrative Procedure Act, and of ultimate review by courts. This emphasizes one danger inherent in departures from the rule of separation of powers: when a governmental power is exercised by a branch other than that ordinarily responsible, the specific guarantees of governmental regularity applicable to the ordinarily responsible branch are in effect short-circuited.

The foregoing assumes that the purpose and effect of the legislative intervention is, at least in part, to correct mistaken exercises of executive or judicial power. In response, amici appear to argue that the purpose of the disapproval device is for Congress to share in the administration of the statute. Under this view, Congress, through section 244(c)(2), fills the interstices of statutory criteria and thereby supplements the Executive's implementation of the statute. This addition of more precise statutory criteria on an accretive, case-by-case basis [33] is, in short, law enforcement.[34] *See generally* J. Dickinson, Administra-

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[33] We would be reluctant to view the statutory criteria of section 244 as so broad and indefinite as to permit constant legislative redefinition that at the same time does not amount to an effective amendment, for such a view would raise serious delegation problems. *See National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-43, 94 S.Ct. 1146, 1148-50, 39 L.Ed.2d 370 (1974); *Amalgamated Meat Cutters* v. *Connally*, 337 F.Supp. 737, 744-63 (D.D.C. 1971) (three judge court) (Leventhal, J.); J. Mashaw & R. Merrill, Introduction to the American Public Law System 223-24 (1975). *Cf.* Frankfurter & Landis, *supra* note 20, at 1013 n. 11 (suggesting delegation doctrine "jejune abstraction"); Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 Law & Contemp. Prob. 46, 49-65 (Summer 1976) (suggesting renewed role for delegation doctrine to solve practical and constitutional difficulties); McGowan, *supra* note 10, at 1127-30 (same).

[34] *Cf. Buckley* v. *Valeo*, 424 U.S. 1, 285, 96 S.Ct. 612, 757, 46 L.Ed.2d 659 (1976) (per curiam) (White, J., concurring and dissenting) (greater concern for legislative disapproval affecting law enforcement and adjudication); *Clark* v. *Valeo*, 559 F.2d 642, 659, 664 & n. 13 (D.C. Cir.) (per curiam) (en banc) (Leventhal, J., concurring) (similar distinction between different administrative functions controlled by legislative veto), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

tive Justice and the Supremacy of Law in the United States 3-31 (1927). In the circumstances of this case, however, such involvement trespasses upon central functions of the Executive.

We turn first to the horizontal disruption caused by one branch assuming the power of another. The Executive evolves its skills and expertise from the administration of a statute over time. This process can be thwarted if legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed. The integrity of the Executive's processes is preserved if stability exists in the steps it takes to effect a legislative policy. Here, there is interference with essential executive functions because the Executive's decision that the House reversed was reached after the Executive had given consideration to an individual case. There was first a quasi-judicial hearing, followed by a review in which the Attorney General was required to exercise a legal discretion. The discretion retained by the political branches was necessarily broad in the case because of the subject matter, the status of aliens; but in the hands of the Executive it was exercisable only in relation to the rights of a particular person under a legal standard subject to judicial interpretation and control for abuse. The Executive's decision, therefore, was a reasoned one, rendered under the law. As such, it was an action that carried all of the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch. Summary reversal of the Executive's decision by the Legislature in a single case, without an indication of a need to change the standards or general rules to be applied, detracts from the

authority of the second branch, and to that extent undermines its powers. Inasmuch as the legislative interference was not an attempt to alter future conduct of the Executive or to change its instructions, and because no principled basis was articulated for the decision from which the Executive could determine with specificity the manner in which it erred, the legislative action was both disruptive of and unnecessary to the sound administration of the law. The horizontal interference with the executive power is egregious in this case, undercutting the second purpose of the separation of powers doctrine, which is to insure efficient administration by the unambiguous assignment of responsibility to specific branches.

The vertical aspects of the interference with the powers of the Executive branch are secondary, but nonetheless significant from a constitutional standpoint. By its action, the Legislature interfered with a relation between the second branch and persons governed by its decisions. The Legislature overrode an administrative process that, gradually, has developed procedural protection for aliens, and one which is characterized by the general, if flexible, requirement of administrative stare decisis.[35] This represents yet another frustration of the checking purpose of the separation principle.

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[35] For examples of the conscientious partnership between the INS, the Attorney General and the courts to develop procedural protections for aliens, *see Wong Wing Hang*, 360 F.2d at 719; L. Jaffe, Judicial Control of Administrative Action 72-73, 77 (1965); Gordon, *Due Process of Law in Immigration Proceedings*, 50 A.B.A.J. 34 (1964); Wildes, *The Nonpriority Program of the Immigration and Naturalization Service Goes Public: The Litigative Use of the Freedom of Information Act*, 14 San Diego L.Rev. 42, 63-66 (1976); discussion in Part B, *supra*.

We are of the view that this departure from the separation of powers norm is not necesary. Although the practicality of alternatives to legislative disapproval in other situations raises difficult questions,[36] we are not here faced with a situation in which the unforeseeability of future circumstances[37] or the broad scope and complexity of the subject matter of an agency's rulemaking authority[38] preclude the articulation of specific criteria in the governing statute itself. Such factors might present considerations different from those we find here, both as to the question of separation of powers and the legitimacy of the unicameral device.

We come finally to the third possible characterization of the disapproval's impact on the operation of the statute. Prominent in this case, as it was presented on appeal, were the contentions of the parties as to whether the action by the House was invalid by reason of its unicameral character. We have concluded that the essence of the violation here was the violation of the separation of powers rule, for the

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[36] *See, e.g.*, Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1414-18 (1975); Friendly, *The Gap in Lawmaking-Judges Who Can't and Legislators Who Won't*, 63 Colum.L.Rev. 787, 801-07 (1963); Larsen, *Legislative Delegation and Oversight: A Promising Approach from Oregon*, 14 Willamette L.J. 1 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 Ind.L.J. 367, 394 (1977) (suggesting limitations on operation of legislative veto that may mitigate constitutional problems).

[37] *See, e.g.*, Nuclear Non-Proliferation Act § 308, 42 U.S.C. § 2159 (Supp. II 1978).

[38] *See, e.g.*, Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1976). *See also* —— F.2d —— *supra* (disapproval device as mechanism to share administration with Executive).

reasons stated above. Perhaps it will be objected that Congress has enacted a mechanism reserving to itself the right to deny discretionary relief from deportation under a separate set of standards, operating as it were as an alternate and supplementary procedure, consisting of the one-house disapproval mechanism. In effect the argument would characterize the legislative disapproval as a separate and essentially legislative procedure operating only after executive and judicial procedures have been completed.[39]

The foundation of this argument is the great power allocated to Congress by article I of the Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, . . . [and] To establish an uniform Rule of Naturalization, . . . [and] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .

U.S.Const., art. I, § 8, cls. 1, 3, 4, 18. *See also Kleindienst* v. *Mandel*, 408 U.S. 753, 765-70, 92 S.Ct. 2576, 2582-85, 33 L.Ed.2d 683 (1972). We note that this authorizes Congress to "make all laws," not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power.

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[39] The effort precisely to characterize a disapproval mechanism in terms of legislative action has produced various analyses, some quite complex. *See, e.g., Atkins* v. *United States*, 556 F.2d 1028, 1063-64 (Ct.Cl. 1977) (per curiam) (en banc) (plurality opinion), *cert. denied*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978); *id.* at 1093-94 (Kashiwa, J., concurring in part and dissenting in part); *Clark* v. *Valeo*, 559 F.2d 642, 678-90 (D.C.Cir.) (en banc) (MacKinnon, J., dissenting), *aff'd mem. sub. nom. Clark* v. *Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977).

Having vested all legislative power in the Congress, the framers deemed it necessary not only to design checks on that power by means of the other branches, but also to use the internal check of bicameralism. The legislative authority was seen by the framers as the most extensive and, therefore, the one most open to abuse. *See, e.g.*, 2 M. Farrand, The Records of the Federal Convention of 1787, at 25-27; 449-53 (1911). This proposition was stressed repeatedly by the authors of the Federalist Papers. The Federalist Nos. 47 (J. Madison); 48 (same); 49 (same); 51 (same); 62 (same); 71 (A. Hamilton); 73 (same). Alexander Hamilton warned of "the tendency of the legislative authority to absorb every other." The Federalist No. 71 (A. Hamilton) at 483 (J. Cooke ed. 1961). As James Madison wrote:

> In republican government the legislative authority, necessarily, predominates. The remedy for this inconveniency is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments by still further precautions.

The Federalist No. 51 (J. Madison) at 350 (J. Cooke ed. 1961).

The principal structural utilities of bicameralism are to restrain the legislative power, to operate to correct its abuse, and to contribute to the integrity of its exercise. 3 M. Farrand, *supra*, at 110 (remarks of Charles Pinckney); The Federalist No. 62 (J. Madison); 1 J. Story, Commentaries on the Constitu-

tion of the United States § 554, at 413 (5th ed. M. Bigelow 1891). *See Buckley* v. *Valeo*, 424 U.S. 1, 129, 96 S.Ct. 612, 687, 46 L.Ed.2d 659 (1976) (per curiam); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif.L. Rev. 983, 1030-32 (1975).

From a reading of the Federalist Papers as a whole, the point emerges with singular clarity that bicameralism was deemed to be one of the most fundamental of the checks on governmental power. The critical function of bicameralism as a restraint on power was explained in the Federalist Papers explicitly, early, and at length. It was one of the principal arguments used, particularly by Madison, to convince the people that the federal government would operate responsibly.

There are three reasons why we do not believe that Congress' article I power over aliens may be relied on to sustain the disapproval of Chadha's suspension of deportation by the statutory mechanism here in question. First, the legitimacy of a particular exercise of this power cannot be decided in the abstract. The disapproval here in question generally follows an elaborate series of administrative procedings. The proposition that one house of Congress has the power to withhold discretionary relief from all deportable aliens in all cases under another regime, such as that of private bills, in which Congress assumes full administrative responsibility, does not establish that that power may also be exercised after the Executive or Judiciary have already exercised their delegated responsibilities. Plenary power for making laws does not import authority to revise particular administrative dispositions. This is a case in which the greater power definitely does not include the lesser, because

the exercise of the lesser power here entails the unnecessary disruption of the operation of the other two branches as we have outlined it above.[40]

Second, amici's characterization requires us to acknowledge that the power to "make all laws" has important formal and procedural limitations. It is most significant that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights. U.S.Const., art. I, § 7. To adopt either Chadha's or amici's description of the section 244 legislative review process precludes our finding compliance with these procedural requirements. The law in question is indisputably the right of an alien: his entitlement to relief from deportation. If we accept Chadha's view that his status before the legislative disapproval is nondeportation, then obviously that status cannot be changed by one house. Amici appear to concede that conclusion but to deny the premise. They argue that the status quo before congressional review is the alien's deportation,

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[40] *Cf.* Rehnquist, *Committee Veto: Fifty Years of Sparring Between the Executive and Legislature* 9-10 (Speech Before the Section of Admin. Law of the Am. Bar. Ass'n, Aug. 12, 1969):

> [W]hen a statute requiring Executive action has emerged from the legislative process, Article II charges the President and his agents with the faithful execution of that statute. It would clearly be a violation of the separation of powers doctrine for the Executive Branch to be required to share its responsibility for that execution with Congress.
>
> If the "committee veto" clause were regarded as constitutional, it would be possible for Congress to have the power to approve or disapprove any act that the Executive Branch took in executing a statute. For example, Congress could add to the criminal, civil rights, and antitrust statutes, as well as all other statutes ad-

until both houses fail to object during the relevant time period. In this respect, amici would analogize the effect of the one-house disapproval to the failure of one house to vote affirmatively on a private bill before it. Although we reject this analogy, we note that it does not necessarily carry the one-house disapproval to a safe harbor of constitutionality in any event. *See* Note, *Private Bills in Congress*, 79 Harv. L.Rev. 1684, 1684-88 & n. 2 (1966). Under this view, it is the nonobjection of both houses which changes the law. Here, also, there is an insurmountable formal constitutional problem. The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference. Amici have offered us no reasoning by which we might distinguish their view of the total section 244 process from a regime under which any presidential proposal on a given subject would become part of the United States Code if no house of Congress objected within, say, sixty days.[41]

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ministered by the Department of Justice, a proviso which would require the Department of Justice to secure the approval of the House and Senate Judiciary Committees before filing any legal action. While it is improbable that Congress would ever attempt this degree of legislative oversight, it would have the constitutional power to enact such a statute if the "committee veto" clause was regarded as constitutional.

[41] See Fleishman & Borosage, *Law and Orders: The Problem of Presidential Legislation*, 40 Law & Contemp.Prob. 1 (Summer 1976); McGowan, *supra* note 10, at 1141 n. 93, 1159 n. 176. *Compare Atkins*, 556 F.2d at 1062-63 (accepting

We consider these two formal difficulties with amici's characterization of the disapproval mechanism decisive. For this reason we need only note that the third difficulty, the potential for unfair or discriminatory use of lawmaking directed at named individuals, presents troublesome issues which we need not reach.[42]

---

argument that unicameral legislative action permitted when "status quo" not altered) *with id.* at 1080 (Skelton, J., dissenting) (mere recommendations cannot become law by legislative inaction). We note that the legislative inaction here raises a problem different from that presented in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. 479 (1941), in which the rules that became effective absent passage of a statute to the contrary were internal procedural regulations that were explicitly defined to exclude any effect on an individual's substantive rights. We also note that this legislation by acquiescence objection is not applicable to the review provision in § 244(c)(3) which requires the approval of both houses of Congress for the granting of discretionary relief.

[42] Generic consideration of this disapproval as an exercise of legislative power, given the potential for discriminatory treatment of individual aliens, coupled with the drastic nature of the sanction, would raise serious bill of attainder and equal protection problems. *See United States* v. *Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965); *United States* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). *But see Flemming* v. *Nestor*, 363 U.S. 603, 612-21, 80 S.Ct. 1367, 1378, 4 L.Ed.2d 1435 (1960) (termination of alien's social security benefits not bill of attainder); *Marcello* v. *Bonds*, 349 U.S. 302, 314, 75 S.Ct. 757, 764, 99 L.Ed. 1107 (1955) (ex post facto clause not applicable to deportation sanction). *See* 634 F.2d pp. 434-435 *supra*.

CONCLUSION

Congress holds all legislative powers. We do not think that body would confess itself unable to formulate deportation rules or policies applicable to individual cases that are sufficiently clear for compliance by the Executive and for ascertainment by the Judiciary. We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial processes. In such a world, the Executive's duty of faithful execution of the laws becomes meaningless, as the law to be executed in a given case remains tentative until after action by the Executive has ceased. The role of judicial review in determining the procedural or substantive fairness of administrative action becomes equally nugatory because ex parte influence on administrative decisionmakers, once condemned,[48] now is made the norm. Such flexibility is but the structural twin of lawless rule.

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[48] *See, e.g., Asimakopoulos* v. *INS*, 445 F.2d 1362 (9th Cir. 1971); McGowan, *supra* note 10, at 1160-61; Comment, *Judicial Limitation of Congressional Influence on Administrative Agencies*, 73 Nw.U.L.Rev. 931 (1978).

Having so held, we underscore that no malevolent design or purpose can be discerned in the congressional scheme. The statute was enacted for the most humanitarian of considerations. Questions of constitutional power, however, necessarily require us to examine enactments from the standpoint of the framers, who were concerned that defects in formal structure be corrected before leading to real or perceived abuses of power at a later date. The case is within our mandatory jurisdiction and it is our duty, after reviewing the statutory provision in this light, to say that it is void.

The decision by the Attorney General to stay deportation is deemed final. The deportation proceedings are deemed cancelled within the meaning of section 244(d) of the Immigration and Nationality Act, and the Attorney General is ordered to cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives. It is so ordered.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File: A17 385 958—San Francisco, California

IN THE MATTER OF JAGDISH RAI CHADHA,
RESPONDENT

Jun. 25, 1974

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act—Section 241(a)(2)—remained longer—student

APPLICATION: Suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Nationality Act

For The Respondent:

Steve Mittleman, Esq.
302 Precita Avenue
San Francisco, California 94110

For the Service:

Stuart Shelby, Esq.
Trial Attorney
San Francisco, California

DISCUSSION OF DEPORTABILITY:

The respondent is a native of Kenya, citizen of the United Kingdom, of the East Indian race, aged 29, who was admitted to the United States as a student on September 6, 1967, at New York, New York. He was subsequently authorized to remain in the United

States as a student until June 30, 1972. He remained thereafter. He has admitted, and I find, that he is deportable as charged.

DISCUSSION OF ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

The respondent has resided in the United States continuously since his entry on September 13, 1967, with the exception of a one week visit to the Worlds Fair at Montreal, Quebec, Canada from which he returned on September 13, 1967. Checks of local police and Federal agencies do not disclose any arrests. There has been made part of the record the affidavits of two citizens of the United States who have known him during his residence in this country attesting to his good moral character. A character investigation conducted by the Immigration and Naturalization Service revealed nothing adverse to him. I find that he has been a person of good moral character for at least seven years preceding his application for suspension of deportation.

The degree of bachelor of science in business administration was conferred upon the respondent by Bowling Green State University, Ohio on March 21, 1970, and the degree of master of arts by the same university on December 16, 1971. He has not been employed since leaving school because, he says, he has been unable to find work commensurate with his professional qualifications by reason of the fact that he does not have a lawful status in the United States. He has been living on his savings which presently total some $3500 in cash. He is engaged to be married to a citizen of the United States. His father is deceased. He has a mother and two brothers in England and a brother and sister in Kenya.

The respondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. He has stated that his deportation would result in a hardship to him because he has formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries.

Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him. I am also of the opinion that because of this circumstance, his application for suspension of deportation should be granted as a matter of administrative discretion.

IT IS ORDERED that the deportation of the respondent be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, as amended.

IT IS FURTHER ORDERED that if Congress takes no action adverse to the order granting suspension of deportation, the proceedings be cancelled and that appropriate action be taken pursuant to Section 244 (d) of the Immigration and Nationality Act, as amended.

IT IS FURTHER ORDERED that in the event Congress takes action adverse to the order granting suspension of deportation these proceedings shall be reopened upon notice to the respondent.

/s/ Chester Sipkin
CHESTER SIPKIN
Immigration Judge

APPENDIX C

CONGRESSIONAL RECORD—HOUSE

(121 Cong. Rec. 40800 (Dec. 16, 1975))

DISAPPROVING GRANTING OF PERMANENT RESIDENCE IN THE UNITED STATES TO CERTAIN ALIENS

Mr. EILBERG. Mr. Speaker, I ask unanimous consent that the Committee on the Judiciary be discharged from the further consideration of the resolution (H. Res. 926) disapproving the granting of permanent residence in the United States to the aliens hereinafter named, in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended, and ask for its immediate consideration.

The Clerk read the title of the resolution.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

Mr. WYLIE. Mr. Speaker, I reserve the right to object.

Mr. Speaker, I reserve the right to object—and I will not object. This resolution has not been available to the Members of the House for review because it was not printed. The Private Calendar objectors met this morning, and we decided that there are extenuating circumstances and will make this resolution an exception so it can be considered by the Members of this body.

The Private Calendar objectors think this resolution does deserve immediate consideration. We would like the RECORD to show, however, that we do not

regard this "expediting" procedure as a precedent as far as the minority Members of the Private Calendar objectors are concerned.

Mr. Speaker, I would yield to the gentleman from Pennsylvania for an explanation of the resolution.

Mr. EILBERG. Mr. Speaker, this resolution has been brought to the floor under the provision of section 244 of the Immigration and Nationality Act which establishes procedures for suspending the deportation of aliens who have had long periods of residence in the United States.

Under that section of law, the Congress is required to review administrative decisions which have recommended the suspension of deportation of aliens who have satisfied the following statutory requirements: First, 7 years of continuous physical presence in the United States; second, good moral character during that time; and third, unusual hardship in the event of their deportation.

It was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended.

I should emphasize that this is a disapproval resolution and unless it is adopted in this session of Congress permanent residence will be granted to those aliens named in the resolution.

Mr. WYLIE. Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The Clerk read the resolution as follows:

H. RES. 926

Resolved, That the House of Representatives does not approve the granting of permanent residence in the United States to the aliens hereinafter named, in which cases the Attorney General has submitted reports to the Congress pursuant to section 244(a)(1) of the Immigration and Nationality Act, as amended:

A17 926 460, Cantu-Cantu, Trinidad.
A17 385 958, Jagdish Rai Chadha.
A14 862 226, Jeffrey H. K. Dowa.
A14 007 721, Lucia Paulino.
A13 601 720, Adib Sami Salem.
A13 950 009, Jose Jesus Villalobos-Calderon.

The resolution was agreed to.

A motion to reconsider was laid on the table.

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

File: A17 385 958—San Francisco, California

IN THE MATTER OF JAGDISH RAI CHADHA,
RESPONDENT

November 8, 1976

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act—Section 241(a)(2)—remained longer—student

APPLICATION: None.

For The Respondent:

John Pohlmann, Esq.
517 Washington Street
San Francisco, California 94111

For The Service:

Brian H. Simpson, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE IMMIGRATION JUDGE

On June 25, 1974, I entered a decision in this case finding the respondent deportable on the charge in the Order to Show Cause, but granted his application for suspension of deportation under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, as amended. In my order I provided that in the event Congress took action adverse to the order grant-

ing suspension of deportation, the proceedings were to be reopened. On December 12, 1975, the House of Representatives passed House Resolution 926 indicating that the House did not favor suspension in the case of the respondent. Accordingly, the proceedings were reopened.

At the reopened hearing, the respondent moved that the proceedings be terminated contending that Section 244(c)(2) which, in effect, provides for congressional review of decisions granting suspension of deportation, is unconstitutional because it is violative of the separation of powers doctrine.

It appears to me that the respondent has a point. However, I have no authority to pass on the constitutionality of acts of Congress. Since he has not applied for voluntary departure, an order for his deportation will have to be entered.

Although the respondent is a native of Kenya, he is a citizen of the United Kingdom, and I designated the United Kingdom as the place of deportability. He then claimed that he would be persecuted if deported to that country. He was given a period of ten days within which to apply to the District Director for asylum or to me for the withholding of his deportation under Section 243(h) of the Immigration and Nationality Act. He did not file either of such applications.

IT IS ORDERED that the respondent be deported from the United States to the United Kingdom on the charge set forth in the Order to Show Cause.

/s/ Chester Sipkin
CHESTER SIPKIN
Immigration Judge

APPENDIX E

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D.C. 20530

File: A17 385 958—San Francisco

IN RE: JAGDISH RAI CHADHA

Feb. 11, 1977

IN DEPORTATION PROCEEDINGS APPEAL

On Behalf of Respondent:

John M. Pohlmann, Esquire
517 Washington Street
San Francisco, CA 94111

On Behalf of I&N Service:

Brian H. Simpson
Trial Attorney

Charge:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant student—remained longer than permitted

Application: None

This case comes forward on appeal from an order of an immigration judge finding the respondent deportable under the provisions of section 241(a)(2) of the Immigration and Nationality Act and ordering his deportation since he declined to make an application for any relief. The appeal will be dismissed.

On appeal the respondent contended that the invocation by the United States Congress of the provisions of section 244(c)(2) of the Act in denying him relief under section 244(a)(1) of the Act is unconstitutional.

This argument is without merit. We have no power to declare unconstitutional an act of Congress, *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940); *Matter of Santana*, 13 I&N Dec. 362 (BIA 1969); *Matter of L....* 4 I&N Dec. 556 (BIA 1951). Moreover, we have held that "Congress has the absolute and unqualified power to prescribe the conditions under which an alien may enter the United States," *Matter of Santana, supra.* In the circumstances, we have no alternative but to affirm the decision of the immigration judge and dismiss the appeal.

ORDER: The appeal is dismissed.

/s/ David L. Milhollan
DAVID L. MILHOLLAN
Chairman

APPENDIX F

[filed Jan. 19, 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Immigration and Naturalization Service hereby appeals to the Supreme Court of the United States from the judgment entered in this case on December 22, 1980, holding unconstitutional Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), and ordering the Attorney General to cancel petitioner's deportation and to cease and desist from taking any steps to deport petitioner based on the resolution enacted by the House of Representatives on December 16, 1975.

This appeal is taken pursuant to 28 U.S.C. 1252.

/s/ John M. Harmon
JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

January 12, 1981

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

ORDER

Before: ELY, KENNEDY and HUG, Circuit Judges.

Upon due consideration, the motion to intervene, filed on behalf of the United States Senate and the United States House of Representatives, is granted. The clerk is requested to circulate the petition for rehearing en banc to the active judges of the court.

Filed Mar. 10, 1981

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Petition for Review of an Order of the
Immigration and Naturalization Service

ORDER

Before: ELY, KENNEDY, and HUG, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Hug have voted to reject the suggestion for a rehearing en banc, and Judge Ely has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Filed Mar. 25, 1981

APPENDIX I

[Filed April 16, 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1702

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that the Immigration and Naturalization Service hereby appeals to the Supreme Court of the United States from the judgment entered in this case on December 22, 1980, as to which a petition for rehearing was denied and a suggestion for rehearing en banc was rejected by order dated March 25, 1981. The Court of Appeals held unconstitutional Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), and ordered the Attorney General to cancel petitioner's deportation and to cease and desist from taking any steps to deport petitioner based on the

resolution enacted by the House of Representatives on December 16, 1975.

This appeal is taken pursuant to 28 U.S.C. 1252.

/s/ Theodore B. Olson
THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

April 14, 1981

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides:

The Congress shall have Power * * *

* * * * *

To establish a uniform Rule of Naturalization, * * *

* * * * *

—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

* * * he shall take Care that the Laws be faithfully executed, * * *.

Section 244 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254, provides in pertinent part:

§ 1254. Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

(c) Fulfillment of requirements of subsection (a); report to Congress

(1) Upon application by any alien who is found by the Attorney General to meet the re-

quirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

* * * * *

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attorney General shall record the alien's lawful ad-

mission for permanent residence as of the date of cancellation of deportation of such alien is made, and unless the alien is an immediate relative within the meaning of section 1151(b) of this title, the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 1153 (a)(8) of this title for the fiscal year then current.

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CLERK

No. 80-1832

In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1832

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

Pursuant to Rule 16.6 of the Rules of this Court, the appellant Immigration and Naturalization Service files this supplemental memorandum to call the Court's attention to the recent decision of the United States Court of Appeals for the Third Circuit in *Dastmalchi* v. *INS*, Nos. 80-2432, 80-2440, and 80-2441 (Sept. 17, 1981).[1] In *Dastmalchi*, the Third Circuit held that it did not have jurisdiction on a petition for review of an order of deportation under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), to consider constitutional challenges by three Iranian aliens to an INS regulation[2] and various practices

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[1]This supplemental memorandum may also be of relevance to the Court's consideration of the petitions for a writ of certiorari filed by the House of Representatives and the Senate in Nos. 80-2170 and 80-2171.

[2]The validity of the regulation, promulgated at the outset of the Iranian hostage crisis to require all nonimmigrant Iranian students to report to an INS district office, was sustained in *Narenji* v. *Civiletti*, 617 F. 2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 975 (1980).

by the INS District Director that allegedly resulted in their deportation. In reaching this conclusion, the Third Circuit expressed its disagreement (slip op. 15-22) with the Ninth Circuit's holding in the instant case (J.S. App. 4a-11a) that it had jurisdiction on a petition for review under Section 106(a) to rule on appellee Chadha's contention that the one-House veto provision in Section 244(c)(2) of the Act, 8 U.S.C. 1254(c)(2), is unconstitutional.

The premise for the Third Circuit's conclusion was that the court of appeals' jurisdiction under Section 106(a) is limited to matters decided in the administrative deportation proceedings; the court therefore reasoned that because the immigration judge and Board of Immigration Appeals do not consider constitutional challenges to the Immigration and Nationality Act and implementing regulations, the court of appeals cannot consider such challenges either. Slip op. 13, 17-18, 19-20. In the present case, in contrast, the Ninth Circuit considered appellee Chadha's constitutional challenge to the one-House veto provision in Section 244(c)(2) of the Act even though the immigration judge and the Board of Immigration Appeals had concluded that they had no authority to pass on the constitutionality of an Act of Congress. J.S. App. 71a, 73a.

Contrary to the Third Circuit's decision, we believe the Ninth Circuit correctly concluded that the immigration judge's and Board of Immigration Appeals' holding that they could not entertain appellee Chadha's constitutional claim at the administrative level did not, in itself, bar the court from considering that challenge on a petition for review. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 762-764 (1975). Moreover, we think it clear that appellee Chadha's constitutional challenge was within the scope of the jurisdiction of the court of appeals under Section 106(a) of

the Act. He "directly challeng[ed]"[3] the final order of deportation. In addition, determinations with respect to suspension of deportation historically have been made "as an integral part of the proceedings which have led to the issuance of a final deportation order" (*Foti* v. *INS*, 375 U.S. 217, 223 (1963)). Such was the case here: the immigration judge, *in the course of deportation proceedings*, suspended appellee Chadha's deportation while the matter was reported to Congress (J.S. App. 66a), and the immigration judge gave effect to the House's resolution of disapproval by reopening those same proceedings and entering an order of deportation. Thus, appellee Chadha plainly challenged a "determination[] made during a [deportation] proceeding conducted under § 242(b) [of the Act]" (*Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968)). The court of appeals therefore had jurisdiction to consider the matter on appellee Chadha's petition for review. *Ibid.*; *Foti* v. *INS*, *supra*. See 2 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 8.9Ab at 8-76 to 8-82 (rev. ed. 1981); *id.* at 8-74 ("[r]eview by the Court of Appeals under [Section 106(a)] includes consideration of any constitutional challenges which would void the deportation order").

We are currently reviewing the Third Circuit's decision in *Dastmalchi* to determine whether a petition for rehearing or motion for modification of the opinion should be filed in that case.[4] Despite the reasoning of that decision, it is not clear that its actual *holding* necessarily is inconsistent with

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[3]See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 215 (1968).

[4]The INS has requested an extension of time within which to file a rehearing petition. Although the government argued in *Dastmalchi* that the court of appeals was without jurisdiction to entertain the aliens' challenge to the INS regulation, it did not urge the broad rationale adopted by that court. Nor did the INS in *Dastmalchi* question the jurisdictional holding by the Ninth Circuit in this case. Therefore, the Third Circuit developed its analysis without the assistance of the parties.

the jurisdictional holding of the Ninth Circuit in the present case. Unlike appellee Chadha, whose claim was integrally related to the deportation proceedings, the aliens in *Dastmalchi* challenged an INS regulation that required them to report to the District Director *before* deportation proceedings were initiated. The District Director's alleged denial of discretionary relief and refusal to reinstate the aliens in *Dastmalchi* to student status likewise either preceded or were independent of the Director's issuance of the show cause orders and therefore also were not part of the deportation proceedings. Compare *Cheng Fan Kwok* v. *INS*, *supra*.

If the Court notes probable jurisdiction of the appeal in this case, it can address the question of the court of appeals' statutory jurisdiction if that question appears worthy of review, for the appeal brings up the "whole case." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975).

For the foregoing reasons and the reasons stated in the jurisdictional statement and reply brief, probable jurisdiction should be noted.

REX E. LEE
Solicitor General

OCTOBER 1981

DOJ-1981-10

Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-1832, 80-2170, 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

JOINT APPENDIX

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NO. 80-1832: JURISDICTIONAL STATEMENT FILED MAY 1, 1981
JURISDICTION POSTPONED OCTOBER 5, 1981
NOS. 80-2170: PETITIONS FOR CERTIORARI FILED JUNE 22, 1981
80-2171: CERTIORARI GRANTED OCTOBER 5, 1981

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DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAGDISH RAI CHADHA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

1977

Mar. 24—Filed original and six Petitions to Review a Deportation Order of the I&NS.

***

Apr. 22—Filed certified administrative record on appeal in one volume. Vol. I, pleadings, three certified copies.

***

July 20—Filed, as of July 18, 1977, 20 Petitioner's Briefs.

***

Oct. 27—Received 25 Respondent's Briefs.

Oct. 27—Filed respondent's suggestion to invite the submission of amici curiae briefs by the U.S. Senate and House of Representatives.

***

Nov. 18—Clerk's letter of 11/17/77, inviting the Vice President of the USA (Mondale) to file a brief amicus curiae within 30 days from this date.

Nov. 18—Clerk's letter of 11/17/77, inviting the U.S. Senate and House of Representatives (Hon.

O'Neill, Jr., Speaker) to file a brief amicus curiae within 30 days from this date.

***

1978

***

Feb. 28—Filed, as of Feb. 27, 25 Amicus Curiae Briefs (House of Representatives).

Feb. 28—Filed, as of Feb. 27, 25 Amicus Curiae Briefs (United States Senate).

***

Mar. 13—Received, as of Mar. 8, 25 Petitioner's Reply Briefs.

***

Mar. 24—Filed, as of Mar. 22, 25 Respondent's Reply Briefs (in response to briefs of Amicus Curiae).

***

Apr. 10—Cause argued and submitted to Ely, Carter, Kennedy, CJJ.

Apr. 11—Filed order (Ely, Carter & Kennedy) counsel for all parties including amici parties, are ordered to submit supplemental briefs within 21 days of this order.

***

Apr. 18—Filed, as of Apr. 14, order (E, C & K) Submission of the case is withheld pending further order of the court.

***

May 1—Filed 25 Petitioner's Supplemental Briefs (Chadha).

May 4—Filed 25 Supplemental Amicus Curiae Briefs (U.S. House of Representatives)

May 4—Filed 25 Supplemental Amicus Curiae Briefs (U.S. Senate)

***

May 16—Filed, as of May 15, 25 Supplemental Respondent's Briefs (I&NS)

***

1980

***

Nov. 28—Filed petitioner's memorandum with respect to current status of petitioner.

Dec. 11—Received, as of Dec. 8, letter dated 12/5/80 from amicus curiae (U.S. Senate) re intended submission of memorandum concerning petitioner's change in status.

Dec. 23—Filed, as of Dec. 22, order (Ely, Kennedy, Hug) case was reassigned to the panel of Judges Ely, Kennedy and Hug. That panel deems further oral argument unnecessary, and the case is ordered submitted herewith.

Dec. 23—As of Dec. 22, Cause Submitted.

***

Dec. 23—As of Dec. 22, Filed Opinion—Deportation Proceedings Cancelled.

Dec. 23—As of Dec. 22, Filed and Entered Judgment.

1981

***

Jan. 6—Filed, as of Jan. 5, Congressional amici's suggestion for a procedural order.

Jan. 19—Filed respondent's Notice of Appeal to the Supreme Court of the United States from the judg-

ment entered in this case pursuant to 28 U.S.C. 1252.

Jan. 19—Filed, as of Jan. 16, order (Kennedy) the mandate in this appeal is hereby stayed for a period of 30 days from the date of this order.

Jan. 20—Filed, as of Jan. 19, order (Ely, Kennedy, Hug) the time for filing a Petition for Rehearing or for Rehearing En Banc, or for other motions or petitions supplementary to those matters, is extended to February 4, 1981.

Feb. 4—Filed, as of Feb. 3, Motion (U.S. Senate) to Intervene.

Feb. 4—Filed, as of Feb. 3, Motion (House of Rep.) to Intervene.

Feb. 4—Received, as of Feb. 3, intervenors' (House and Senate) Petition for Rehearing and Suggestion for Rehearing En Banc.

Feb. 17—Filed petitioner's Memorandum in Response to Motion to Intervene filed by House and Senate.

Mar. 12—Filed, as of Mar. 10, order (Ely, Kennedy, Hug) the Motion to Intervene of the U.S. Senate and the House is granted. The clerk is requested to circulate the Petition for Rehearing En Banc to the active judges of the court.

Mar. 12—Filed as of Mar. 10, Petition for Rehearing (House & Senate) and Suggestion for Rehearing En Banc.

Mar. 25—Filed order (Ely, Kennedy, Hug) the Petition for Rehearing is denied and the Suggestion for Rehearing En Banc is rejected.

Apr. 1—Filed intervenors' Motion to Stay Mandate.

Apr. 8—Filed order (Kennedy) the Motion to Stay Mandate is hereby granted.

Apr. 16—Filed respondent's Notice of Appeal to the Supreme Court of the United States pursuant to 28 U.S.C. 1252.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
)
Jagdish Hari CHUDA)
Respondent.)

To: Jagdish Hari CHUDA
1210 Masonic Avenue, #2
Berkeley, California 94706
(Number, street, city, state, and ZIP code)

File No. A17 385 958

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Kenya
and a citizen of The United Kingdom;
3. You entered the United States at unknown place on or about September 13, 1967;
(place)
4. You were admitted as a nonimmigrant student for a temporary period and authorized to remain in the United States until June 30, 1972;
5. You have not departed from the United States.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of said Act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 9:30 A.M.
300 North Los Angeles Street, Los Angeles, California
on January 11, 1974 at 9:30 A.M., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: [illegible]

IMMIGRATION AND NATURALIZATION SERVICE

Form I-221
(Rev. 3-30-67)

[signature]
(Signature and title of issuing officer)

ACTING
(over) DISTRICT DIRECTOR, Los Angeles, California

Exhibit 1 to Hearing in Deportation Proceedings held January 11, 1974 before Chester Sipkin, Immigration Judge

85-991 7

Best Copy Available

TRANSCRIPT OF HEARING IN DEPORTATION PROCEEDINGS HELD JANUARY 11, 1974, BEFORE CHESTER SIPKIN, IMMIGRATION JUDGE

Appearances:

For the Immigration and Naturalization Service—Stuart Shelby, Esq.

For the Respondent—Steve R. Mittleman, Esq.

The IMMIGRATION JUDGE. Mr. Shelby, are you ready to proceed?

Mr. SHELBY. Yes, Your Honor.

The IMMIGRATION JUDGE. Mr. Mittleman, are you ready to proceed?

Mr. MITTLEMAN. Yes.

The IMMIGRATION JUDGE. This is a deportation proceeding in the matter of Jagdish Rai Chadha. The respondent will testify in the English language.

Q. Are you Jagdish Rai Chadha?

A. Yes, sir.

Q. Please stand and raise your right hand. Do you solemnly swear that the testimony you give at this proceeding will be the truth, the whole truth and nothing but the truth, so help you God?

A. I do.

The IMMIGRATION JUDGE. Mr. Mittleman, during the course of the proceeding you will be afforded an opportunity to examine any evidence offered against the respondent by the government, to object to the introduction of that evidence into the record, to cross-examine any witnesses called by the government and to present any evidence that you have on his behalf.

The Order to Show Cause which was issued in this

case will be made part of the record and marked *EXHIBIT 1.*

Mr. Mittleman, do you wish to answer the allegations in the Order to Show Cause for the respondent?

Mr. MITTLEMAN. Yes, I do.

The IMMIGRATION JUDGE. You waive the formal reading and explanation of the Order to Show Cause?

Mr. MITTLEMAN. Yes, I do.

The IMMIGRATION JUDGE. There are five allegations in the Order to Show Cause. Please advise which of the allegations you wish to admit and which of the allegations you wish to deny on behalf of the respondent.

Mr. MITTLEMAN. I wish to admit allegation number one. I admit allegation number two with an explanation that will come in the pleadings. I deny allegation three, admit allegation four and admit allegation five.

The IMMIGRATION JUDGE. Before I ask you to plead to deportability, Mr. Mittleman, give me your explanation that you said would be forthcoming in regard to allegation number two.

Mr. MITTLEMAN. In reference to two that he is a native of Kenya, I would establish and I have a letter from the Kenya government, that although he was born in Kenya that he absolutely has no status as a person in Kenya. Kenya has no ties or responsibilities toward him.

The IMMIGRATION JUDGE. The allegation is simply that he is a native of Kenya, the place he was born. Was he born there?

Mr. MITTLEMAN. Yes, but as to the United Kingdom I would like to show the Court that although he does

have a British passport which indicates he is a subject and citizen, in essence it's really nothing more than a travel document and that he really does not have citizen status in the United Kingdom and that is one of the problems in the situation we have here.

The IMMIGRATION JUDGE. Of course the second portion has nothing to do with deportability although it is set forth in the Order to Show Cause. Now in regard to allegation number three, why did you deny allegation number three?

Mr. MITTLEMAN. He entered the country on September 12, 1966, and I believe that was in New York. In fact, it was at JFK.

The IMMIGRATION JUDGE. Mr. Shelby, does the Service file show that was the date and place of entry?

Mr. SHELBY. Yes, Your Honor, the respondent's last entry into the United States was on September 13, 1967. However, he was admitted to the United States at New York, New York, on September 16, 1966, in the nonimmigrant classification of F–1. He was admitted until September 12, 1967, and received extensions of stay until June 30, 1972.

The IMMIGRATION JUDGE. Mr. Mittleman—I should address this question to you, Mr. Shelby, why does the Order to Show Cause show that he entered at an unknown place on September 13, 1967?

Mr. SHELBY. Because, Your Honor, in an interview which the respondent had with an investigator of the Service on July 16, 1973, he informed the investigator that he entered the United States on September 13, 1967, at an unknown place on the Canadian border.

The IMMIGRATION JUDGE. Did he also state how long he had been in Canada?

Mr. SHELBY. Yes, Your Honor. He stated that on September 7, 1967, he departed the United States and entered Canada at Blackpool and he reentered the United States on September 13, 1967. He further stated that he went to Canada for the Expo '67 with a group of other students and that they used their Forms I-20 with passports to reenter the United States.

The IMMIGRATION JUDGE. Mr. Mittleman, it appears that allegation number three is literally correct.

Mr. MITTLEMAN. Yes, Your Honor, it is correct and we will admit to that statement. I just wanted to clarify as to the correct date he first entered this country.

The IMMIGRATION JUDGE. Let's get back to the charge in the Order to Show Cause. Do you concede that he is deportable as charged?

Mr. MITTLEMAN. Yes.

The IMMIGRATION JUDGE. Do you wish to apply for any form of discretionary relief on his behalf?

Mr. MITTLEMAN. Yes, suspension of deportation.

The IMMIGRATION JUDGE. Do you have the application?

Mr. MITTLEMAN. No, I don't, Your Honor. That is one of the reasons——

The IMMIGRATION JUDGE. Why don't you have it if you are going to apply for it?

Mr. MITTLEMAN. Basically, this decision was made by me this past week and I was only given notice of

this hearing, I guess, less than a week now and I had just started doing the research and understanding the law and I haven't been able to put my case together at this point. So in essence there was a misunderstanding of the law on my part. I thought it could be oral argument where there didn't have to be a formal application given to the judge.

The IMMIGRATION JUDGE. Before the hearing started you informed me that you would like me to adjourn the hearing so that you could prepare such an application. Is this what you have in mind?

Mr. MITTLEMAN. That is correct, yes.

The IMMIGRATION JUDGE. Before you do so, I want to have it clear in my mind that he is at least prima facie eligible for the relief he seeks and I am going to ask Mr. Chadha a number of questions.

Q. How old are you, Mr. Chadha?

A. I'm thirty-six years old.

Q. Are you married?

A. No, sir.

Q. Have you ever been married?

A. No, sir.

Q. Are you employed?

A. No, sir.

Q. How are you supported?

A. I had a lot of savings when I came to the United States and at the same time I have been getting some money from my mother.

Q. When did you last work—or have you worked since you have been in the United States?

A. I was working during summers when I was in school.

Q. When did you last go to school?

A. After '72.

Q. Up to, not after?

A. No, I didn't go after that when I finished my graduate work in June.

Q. In June of 1972?

A. Yes.

Q. Do you have a graduate degree?

A. Yes, sir.

Q. In what?

A. In political science and economics.

Q. What kind of degree is it?

A. Masters and I have a bachelors in business.

Q. How is it that you haven't worked since June of 1972?

A. Everytime I just apply for a job the prospective employer wanted to know whether I was a permanent resident of this country and I had about ten interviews and everytime the whole thing—the case revolved around my permanent residence.

Q. You do intend to work if you are granted permanent residence, aren't you?

A. Yes, that is the plan and I had to go to Los Angeles because I had a job offer there but the employer said he was reluctant to hire me because of my being in a nonpermanent status.

Q. In order to be eligible for suspension of deportation you must establish that your deportation will result in an extreme hardship to you. Tell me briefly why you think your deportation would result in an extreme hardship to you.

A. Yes, sir. If your office has decided to deport me to Kenya where I was born—well, already you are probably familiar with the Asian situation in East Africa. It's very precarious and from time to time—I have got some papers telling—

Q. What is your racial derivation?

A. I'm of Indian origin.

Q. That's East Indian?

A. Yes, sir. from India.

Q. Anything else?

A. Well, sir, in '63 Kenya became independent and they extended us a grace period to '65 and '66 to become citizens and I applied for Kenyan citizenship because at that time I was coming to the United States for my education but things were very hard at that time for Asians because the nationalism was at its height and so my letters were not answered at all so I went for an interview also and he told me that I should travel on a British passport and when I came—well, I was in England for only about twelve days so when I came to the United States I was in touch with the Kenyan Government, the immigration authorities, asking them whether I could return after my education and they told me that I was entirely British responsibility.

Q. In other words, they said you couldn't go back to Kenya. Is that what you're saying?

A. Yes, sir. They said I could go back provided, like any other country, if I could get a job and my employer can get me a work permit and so I got in touch with——

Q. Before we go on, so far the hardship that you alluded to is based on the fact that you couldn't go back to Kenya.

A. Yes, sir.

Q. Is there any other hardship that you can think of?

A. Sir, I can't get a job there.

Q. Where?

A. In Kenya.

Q. If you can't go back, naturally you couldn't get a job there. That follows.

A. Yes, sir, but that is as far as Kenya is concerned and since they mentioned that I was not their responsibility, I had no status in Kenya, so I got in touch with the British Government and the British Government had established a quota system and according to that quota system only 1500 East African Asians were allowed a year. But about a year ago a mass exodus of Asians took place in Uganda so they are attacking this policy very much. And then, I got letters from them saying it will take several months, in fact, many years for me to go to England on a permanent basis.

Q. So what you are saying is, you can't go to Kenya because they won't let you in and notwithstanding you have a United Kingdom passport, you can't go to Britain because they also won't let you in?

A. Yes, sir.

Q. Would you be able to go back to India?

A. No, sir. I have never been there.

Q. Where do your parents live?

A. My mother lives in London and my father is dead.

Q. Any other hardship that you can think of?

A. Hardship in the sense that it would be hard for me to get a job over there.

Q. Well, you don't have to think of getting jobs in either the United Kingdom or Kenya if you can't go back. You don't have to elaborate on that aspect of your case.

A. Sir, I don't understand what other hardship you are thinking.

Q. I am not thinking of any hardship. You are supposed to be the one to think of hardship, but we will pass over that.

The IMMIGRATION JUDGE. Mr. Mittleman, the law requires that we go into the next aspect of the case and that is the country of deportability. I am required to ask this next question of Mr. Chadha.

Q. In the event you are ordered deported, to what country do you wish to be sent?

Mr. MITTLEMAN. Would it be possible not to name a country at this time?

The IMMIGRATION JUDGE. Yes, it would be.

Mr. MITTLEMAN. That's the position I want to take.

The IMMIGRATION JUDGE. Under the law, Mr. Mittleman, if the respondent does not specify a country then I am required to designate one and under the law I am required to designate the country of which he is a citizen first. I inform you that if I should eventually enter an order of deportation from this country I will in the first instance order that he be

deported to the United Kingdom. If you think the respondent will be persecuted in the United Kingdom because of his race, religion, political opinion or social position you may ask for withholding of his deportation to the United Kingdom. Do you wish to apply for the withholding of his deportation on that basis? Mr. Mittleman, perhaps you might want to answer that.

Mr. MITTLEMAN. Your Honor, in this situation I do believe there is a racial problem that does exist in Great Britain. Unfortunately, the next choice is even a greater racial problem.

The IMMIGRATION JUDGE. I intend to get to Kenya when we are finished with the United Kingdom, Mr. Mittleman. I just want to know whether you wish to file an application for the withholding of the respondent's deportation to the United Kingdom on the ground he would be persecuted there.

Mr. MITTLEMAN. I do believe there is a racial discrimination there.

The IMMIGRATION JUDGE. There is racial discrimination in this country too. Do you feel that the British Government would persecute against him? Is that what you are saying? The reason I am asking you this is because if you say so, you must establish this before I grant the withholding of deportation.

Mr. MITTLEMAN. Yes, I do believe that there is persecution against East Asians from East Africa in Great Britain.

The IMMIGRATION JUDGE. By the Government of Great Britain?

Mr. MITTLEMAN. By the Government, that's correct. By their policies.

IMMIGRATION JUDGE. Well yours will be the first application I have seen on that basis but perhaps you will be a leader in that regard. Now, Mr. Mittleman, in the event the respondent is not accepted as a deportee by the United Kingdom, then as an alternative I propose to order that he be deported to Kenya, the country of which he is a native. If you believe that he would be persecuted because of his race, religion or political opinion in Kenya you may also apply for the withholding of deportation to that country.

Mr. MITTLEMAN. I believe that the racial discrimination is even greater by the Government of Kenya.

The IMMIGRATION JUDGE. From what you have told me, he can't be deported to either country, so how come you are applying for the withholding of his deportation to those countries?

Mr. MITTLEMAN. Admittedly, I might have the procedures slightly incorrect. It was explained to me when applying for suspension there has to be a country to deport. In that instance I could name Great Britain, but I do feel that there is racial discrimination on the part of the government there and I also feel that there is in Kenya. The reason I propose to apply for suspension is that as an individual, in order for him to have any livelihood and I'm not saying in terms of livelihood he has a better opportunity because this country is better economically than any other country, but I am saying in any country he has to have permanent residence or some sort of tie with

that country in order to get gainful employment. And this is the reason I am trying to establish that he could get permanent residence in this country because that's the only way he could get that type of employment in this country and have an opportunity for livelihood.

The IMMIGRATION JUDGE. All I can say, Mr. Mittleman, is you are making an awful lot of work for yourself but it is all right with me because under outstanding instructions as soon as a person claims that he is going to be persecuted in any country to which he may be deported, the case is adjourned so that he can make an application for asylum in this country. Ordinarily, a person would not apply for asylum, it seems to me, if you couldn't deport him to the country specified but I am required to do it. I am going to adjourn the hearing.

Mr. MITTLEMAN. Excuse me. If that is the case, if he has to have a country, can I retract my previous statement against Great Britain and let you designate Great Britain?

The IMMIGRATION JUDGE. There is no requirement for a country of deportability in order to be eligible for suspension. You still are applying for the withholding of his deportation to Kenya. I will have to put off the case anyway.

Mr. MITTLEMAN. What I am trying to establish by this situation is the hardship that this man faces, the extreme hardship.

The IMMIGRATION JUDGE. I don't want to see the hardship at this point. I will wait for that until you

make your application for suspension. I'm telling you that under outstanding instructions when a person applies for the withholding of his deportation, the matter must first be referred to the Department of State and you must justify it and if you are certain in your own mind he won't be deported to Kenya you are going through a lot of motions for no reasons but that's up to you.

Mr. MITTLEMAN. I understand that. I feel that this is right and that's what I have to do.

The IMMIGRATION JUDGE. It's perfectly all right, Mr. Mittleman. In the meantime you can prepare the application for suspension so that if your request for asylum should be denied, you could still proceed on that basis. It seems to me there should be some way for us to avoid this though.

Mr. MITTLEMAN. May I address the Court off the record?

The IMMIGRATION JUDGE. Yes.

On the record. Mr. Mittleman, off the record, we discussed the possibility of your postponing the respondent's request for the withholding of his deportation. I think that that would probably be the best solution. I will not require you now, if you wish me to, for you to submit an application for the withholding of his deportation with the understanding that if his application for suspension of deportation should be denied that you will then be given an opportunity to do so. Is that what we agreed upon?

Mr. MITTLEMAN. Yes and that's what I wish.

The IMMIGRATION JUDGE. All right, we will do it that way.

Mr. Shelby, before I adjourn the proceedings to afford Mr. Mittleman an opportunity to apply for suspension of deportation, do you have anything else?

Mr. SHELBY. Yes, Your Honor. I would like to offer into evidence the respondent's I–94 verifying that he was admitted to the United States on September 13, 1966.

The IMMIGRATION JUDGE. Do you have any objection to this form being made part of the record, Mr. Mittleman?

Mr. MITTLEMAN. No objection, Your Honor.

The IMMIGRATION JUDGE. The form will be made part of the record and marked EXHIBIT 2.

Mr. SHELBY. Your Honor, I would like to offer into evidence a British passport, number D 658159 which was issued to Mr. Jagdish Rai Khiali Ram Nathod Ram Chadha. The passport contains thirty pages. On page one of the passport, the respondent's nationality is indicated as follows: "British Subject: Citizen of the United Kingdom and Colonies." Page five of the passport contains a stamp from the British Consulate General in Chicago dated May 28, 1971, indicating that the passport was renewed, valid until 8 July 1976. Page 28 of the passport contains a Kenya Resident's Certificate verifying that the respondent has a resident's certificate valid for the life of the holder of the certificate. Below it is a stamp which reads as follows: "Valid for return to Kenya within the validity of this Certificate."

The IMMIGRATION JUDGE. Mr. Mittleman, have you any objection to the receipt of this passport into evidence?

Mr. MITTLEMAN. No objection, Your Honor.

The IMMIGRATION JUDGE. The passport will be made part of the record of this proceeding and marked *EXHIBIT 3.*

Is that all, Mr. Shelby?

Mr. SHELBY. Yes, Your Honor.

The IMMIGRATION JUDGE. Mr. Mittleman, how long will it take you to prepare for the next hearing in the case?

Mr. MITTLEMAN. I would like two weeks, Your Honor.

The IMMIGRATION JUDGE. The hearing will be adjourned to January 31, 1974, at 1:00 p.m.

Mr. Mittleman, at that time also bring a fee of $50 which is required by regulations.

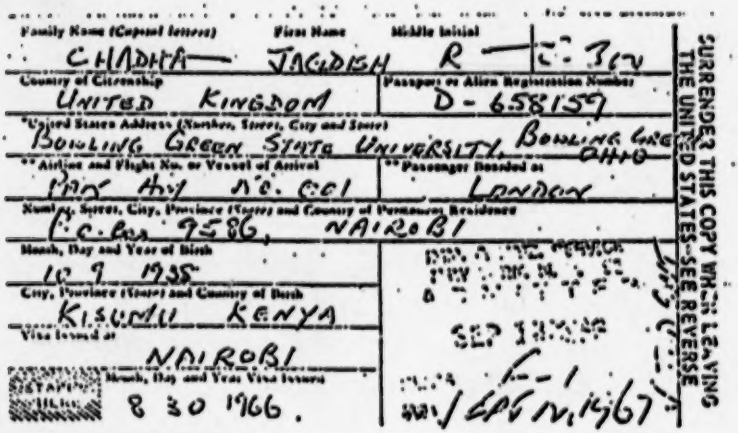
The hearing is adjourned.

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered 1 through 14 are a complete and accurate transcript of the above hearing.

FAYE LOTHRIDGE,
Closed Microphone Reporter.

JANUARY 14, 1974.

Form I-94, Arrival-Departure Record
dated September 13, 1966



Family Name (Capital letters): CHADHA — First Name: JAGDISH — Middle Initial: R — C. 3 IV

Country of Citizenship: UNITED KINGDOM — Passport or Alien Registration Number: D-658159

*United States Address (Number, Street, City and State): BOWLING GREEN STATE UNIVERSITY, BOWLING GREEN OHIO

**Airline and Flight No. or Vessel of Arrival: PAN AM NO. 001 — **Passenger Boarded at: LONDON

Number, Street, City, Province (Town) and Country of Permanent Residence: P.O. Box 9586, NAIROBI

Month, Day and Year of Birth: 10 9 1938

City, Province (Town) and Country of Birth: KISUMU KENYA

Visa Issued at: NAIROBI

STAMP — Month, Day and Year Visa Issued: 8 30 1966.

SEP 13 1966

F-1

SURRENDER THIS COPY WHEN LEAVING THE UNITED STATES-SEE REVERSE

Exhibit 2 to Hearing in Deportation Proceedings Held January 11, 1974 Before Chester Sipkin, Immigration Judge

Exhibit 3 to Hearing in Deportation Proceedings Held January 11, 1974 Before Chester Sipkin, Immigration Judge - Handwritten note stating that the Respondent's passport was returned to him on December 6, 1974.

TRANSCRIPT OF HEARING IN DEPORTATION PROCEEDINGS HELD FEBRUARY 7, 1974, BEFORE CHESTER SIPKIN, IMMIGRATION JUDGE

Appearances:

For the Immigration and Naturalization Service—Stuart Shelby, Esq.

For the Respondent—Steve R. Mittleman, Esq.

The IMMIGRATION JUDGE. The first session of the hearing in this case took place on January 11, 1974, and was adjourned to afford the respondent an opportunity to prepare an application for suspension of deportation. Mr. Mittleman, are you ready to proceed?

Mr. MITTLEMAN. Yes, your Honor.

The IMMIGRATION JUDGE. Mr. Shelby, are you ready to proceed?

Mr. SHELBY. Yes, your Honor.

The IMMIGRATION JUDGE. Prior to the commencement of the hearing the respondent executed before me an application for suspension of deportation. This application together with its supporting documents will be made part of the record of the proceedings and marked EXHIBIT 4. Mr. Mittleman, are there any questions you would like to ask the respondent in connection with this application?

Mr. MITTLEMAN. Yes, your Honor.

Q. Mr. Chadha, would you tell the Court the hardships you would face?

The IMMIGRATION JUDGE. Do you think that will be necessary, Mr. Mittleman, since he has executed an affidavit?

Mr. MITTLEMAN. No, your Honor.

The IMMIGRATION JUDGE. Is there anything else?

Mr. MITTLEMAN. No.

The IMMIGRATION JUDGE. Mr. Shelby?

Mr. SHELBY. No, your Honor.

The IMMIGRATION JUDGE:

Q. Mr. Chadha, I see that you graduated from Bowling Green State University——

A. Yes, sir.

Q. And were given a diploma on December 16, 1971.

A. Yes.

Q. Have you done any work since you have graduated from college?

A. Well sir, I tried many places for the job in which I was qualified and every time I was told that I had to get the proper immigration visa.

Q. Do I understand from that that you have not worked?

A. No, I haven't.

Q. What have you been doing with yourself?

A. Well I was—first of all I was in Ohio for about six months and then I left that place, and I was looking for jobs around everywhere, and then I came to this Bay Area. Last year I had some job opportunities to get employment and I went to Los Angeles office in order to get a visa or to get some sort of word from them that I could work here since my case was very difficult I couldn't leave this country so they just confiscated my passport and Immigration told me not to work until the case has been sorted out. This is what I was told there.

Q. Who told you that?

A. The clerks at the Los Angeles office—immigration office.

Q. You were told not to work?

A. Yes, sir.

Q. Did they tell you why you couldn't work?

A. They said, "While you are under deportation orders, or else you will be deported, so it will be in your best interest—interests of this case to first settle the whole issue and then you can work." This is what—and I was so afraid of getting employment. I thought it would be illegal because I didn't know the rules, your Honor. So that's when I got in touch with Steve—Mr. Mittleman.

Q. When did you get in touch with him?

A. In August.

Q. August of what year?

A. Last year.

Q. August of 1973?

A. Yes, sir.

Q. And what did Mr. Mittleman tell you?

A. Well I just told him that I'm being deported and so I am under the orders. So he took my case and I told him that I cannot get employment because some of these companies ask for permanent citizens' order.

Q. Did you ask Mr. Mittleman if it was all right for you to work at any time or did you ask him if you were prohibited by the immigration laws from working?

A. I didn't ask him. I told him that I was prohibited not to work because this is what Los Angeles office told me.

Q. And Mr. Mittleman accepted that? He didn't say that it was wrong.

A. I guess—well he didn't—I just made the statement. He didn't say anything.

Mr. SHELBY. Your Honor, I would like to question the respondent this afternoon.

The IMMIGRATION JUDGE. I thought you had no questions.

Mr. SHELBY. It just occurred to me that he made two statements which may be inconsistent: one, that he wasn't employed because he was advised by this Service's employees that it would be in his best interest not to work, and the other statement was that he tried to obtain employment but couldn't because he didn't have the proper immigration documents.

The IMMIGRATION JUDGE:

Q. Explain that, Mr. Chadha.

A. I was looking for a job before I went to Los Angeles office—immigration office and I had written many applications and had some interviews and they told me that I have to get proper visa.

By Mr. SHELBY:

Q. When did you visit the Los Angeles Immigration Office?

A. June—I think it was June or July '73. After that I could not look for job because these people told me it would be sort of illegal like to get a job and they said—they asked me whether I was working; I said, no. He said, "We can trace it out if you are working." I said, well go ahead. He said, "If you are working that will be illegal act."

Q. Who told you that?

A. These people in Los Angeles.

Q. Did they misunderstand and think that you were in a student status?

A. No, they knew that I was no student.

The IMMIGRATION JUDGE. You are the first one who has ever told me that an Immigration Service employee advised them that they couldn't work when they are here illegally. There is absolutely no such law. And, I don't see how a clerk particularly those clerks who are trained at the information counter could give you that information. It strains credulity a little bit.

RESPONDENT. These people, these clerks at the information did not tell me that. The gentleman whom I approached at the immigration window looked at my passport. I wanted to discuss with him or talk with him that if there is any possibility for them to give me some sort of letter saying that I could work in this country since the companies or the institutions were looking for permanent residents. As soon as he looked at my passport and saw that it had expired and that I was staying illegally in this country he hustled me upstairs to the office of deportation where nobody would talk to me or somebody even said, "Now you are illegally here. There are lots of illegal immigrants in this country and we are going to deport you." And then they decided that I should have a hearing and some guy jokingly said that "Your offense is so big" that I could be put in the can. So then I asked this gentleman who was typing out all these things and then he told me that "Where do you want your hearing?" I said, well since I live in Berkeley, it would be

better to have it in San Francisco. And—But, they scheduled the hearing in Los Angeles which Mr. Middleman got it changed to this place. And at that time since I have a job opportunity to get into the field in which I want to, can I go ahead and work. They said, no, because, he says, "In your best interest it would be best not to work till this whole matter is straightened out." And that is why they kept on lingering and lingering and—until I got tired and I said it looks like I have to have a confrontation with the whole problem.

The IMMIGRATION JUDGE. If you asked the Immigration Officer to give you permission to work that is another story. He has not [sic] authority to authorize anybody to work, you don't need any authority. However, I will say on an occasion it is stamped on aliens' passports that they are permitted to work under certain circumstances.

RESPONDENT. Yes, sir. That's the advice I was told when I was at school that we are eligible to work during summers only and in case we do decide to live in this country we have to have the proper visa for the number of times or the number of months we would like to stay in this country as a training period. So that's why I had to use all my savings and ask my——

The IMMIGRATION JUDGE. I was going to get to your savings.

Q. In your application you show that you have $3,500 in assets. Where did you get this $3,500?

A. Well I had savings from—all this money is not here, part of it is in England.

Q. How much assets do you have here?

A. About $1100. I had about 2200–$2300.

Q. How were you supported when you were going to school?

A. I was on a scholarship and when I was at graduate school or when I was at undergraduate school I was on a grant.

Q. I still don't understand. Where did you get the $3500? How did you come in possession of $3500 which you say you have in assets?

A. This is—I brought with me about $2200 roughly, I think, and——

Q. And where did you get the $2200 that you brought with you?

A. From Kenya where I was working.

Q. That is what I am trying to find out: where you got the money from.

A. Oh, I'm sorry. And plus I kept on replenishing my savings by working in summers.

Q. I see in these documents that you presented that you have a fiancee by the name of Meaveen Sague, is that correct?

A. Yes, sir.

Q. Do you intend to get married in the near future?

A. It's not—well I cannot pinpoint the time but we eventually would get married.

The IMMIGRATION JUDGE. The reason I ask this is because your case is not a particularly good one for suspension of deportation. However, if you got married you would have no difficulty in having your status adjusted. Anything else, Mr. Mittleman?

Mr. MITTLEMAN. No, your Honor.

The IMMIGRATION JUDGE. Anything else, Mr. Shelby?

Mr. SHELBY. I'd just like to note for the record, your Honor, that I have a note in the respondent's file in my hand and I can't recall whether I made the telephone call or if someone did it at my request but the note reads as follows: "British Consulate contacted January 11, 1974. May be admissible to Great Britain, Kenya, or India as Ugandans have been admitted in similar circumstances."

The IMMIGRATION JUDGE. Mr. Mittleman, I'm unable to find on the basis of the evidence submitted that Mr. Chadha would suffer the extreme hardship required by the statute. Accordingly, I am going to deny his application for suspension of deportation. Now as an alternative you have asked for asylum on his behalf.

Mr. MITTLEMAN. That's correct.

The IMMIGRATION JUDGE. You want to proceed with that, I presume.

Mr. MITTLEMAN. Yes, your Honor.

The IMMIGRATION JUDGE. All right. I won't render my decision now. I'm going to adjourn the case so that you may proceed with your application for asylum. You will hear from the Immigration Service in connection with that application.

Mr. MITTLEMAN. Your Honor, with regards to that I might—I would just like to point out that there are letters and documentation which was submitted with the application from both the Republic of Kenya and also the British Consulate that indicates the situation that we have explained: that Mr. Chadha is not able to go to these countries.

The IMMIGRATION JUDGE. Sometimes it makes a difference if the Immigration Service asks rather than the respondent asking. I don't say it would make a difference but has been known to happen.

Mr. MITTLEMAN. That's possible.

The IMMIGRATION JUDGE. All right, you will hear further with regard to your request for asylum. When you come before me again there will be no necessity for paying any fee if the request is made to me under Section—under what is known as Section 243(h) of the Immigration and Nationality Act, because the respondent has paid his fee in connection with the application for suspension and that covers any other applications.

The hearing is adjourned.

The hearing is resumed.

Mr. Mittleman, on further thought I think I might be inclined to grant this application for suspension of deportation. Accordingly, I am going to ask you to withdraw for the present your request for asylum in behalf of the respondent. Do you agree?

Mr. MITTLEMAN. I withdraw it. Yes, I do.

The IMMIGRATION JUDGE. Now the next thing I have to do I have to have a character investigation conducted in this case. Those things take anywhere from six to nine months. When the character report is received and it is favorable, I would like you to stipulate that it may be made part of the record without further hearing. Do you so stipulate?

Mr. MITTLEMAN. I so stipulate.

The IMMIGRATION JUDGE. I presume you so stipulate also, Mr. Shelby.

Mr. SHELBY. Yes, your Honor.

The IMMIGRATION JUDGE. All right. I'll have the character investigation made and I'll consider the case further after it is received.

The hearing is closed.

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered 15 through 23 are a complete and accurate transcript of the above hearing.

RAYMOND L. HOLTON,
Closed Microphone Reporter.

Date: MARCH 1, 1974

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

Form approved
OMB No. 43-R0245

File No. A

FEE STAMP

APPLICATION FOR SUSPENSION OF DEPORTATION

(Under Section 244 of the Immigration and Nationality Act)

(PLEASE READ ADVICE AND INSTRUCTIONS BEFORE FILLING IN FORM)

(1) I, the undersigned, hereby request that my deportation be suspended under the provisions of section 244 of the Immigration and Nationality Act. I believe that I am eligible for suspension of deportation because such deportation would result in extreme hardship to myself and/or to my ____ (Husband, wife, father, mother, child, children)

who is/are { ☐ citizen(s) / ☐ lawful permanent resident(s) } of the United States; and I have been physically present in the United States without an absence since ... September 16, 1966 - see attached

(2) My present true name is: (First, Middle, Last) — (10) My name given at birth was: Jagdish Rai Chadha

(3) I have been known by the additional name(s): none — (My sex is) male — (Height) 5'9¼" — (Color of eyes) brown — (Color of hair) black — (Complexion) dark

(4) I was born at (Place and country) Kisumu, Kenya — on (Month) (Day) (Year) 10/9/44 — My nationality is (Country of which citizen or subject) Great Britain

(5) I now reside at (Apt. number and/or in care of) Apt. 2 — (Number and street) 1210 Masonic Ave. — (City or town) Berkeley — (State) CA. — (ZIP Code) 94706

(6) I first entered the United States under the name of (First) Jagdish (Middle) Rai (Last) Chadha — on (Month) (Day) (Year) 9/16/66 — At (airport, seaport, or land border port) JFK - New York

Name of vessel or other means of conveyance: Pan Am — I was admitted as a (Insert visitor, crewman, treasure, student, permanent resident, or other): Student

for a period of time to expire (Insert date of period for which admitted): June 1972

If not inspected or if entry occurred at other than a regular port, describe the circumstances as accurately as possible: 4 (four) years

Since the date of my first entry I departed from and returned to the United States at the following places and on the following dates: (If you have never departed from the United States since your original date of entry, insert "no departures.")

(DEPARTED) Place	Date (Month-Day-Year)	(RETURNED) Place	Date (Month-Day-Year)	Immigration and Naturalization Service Officer (Admitted Yes or No)
New York	9/6/67	New York	9/1?	

(7) During the last 10 years, I have been in the United States as listed below: (If less than 10 years, set forth the time I have been in the United States.) List present address FIRST, and work back.

Street and Number—City or Town—State (Include number of boat room, furnished room or apartment or general address)	From—Month	From—Year	To—Month	To—Year
1210 Masonic Ave. #2 Berkeley, CA.	August	1972	present	
327 E. Court Bowling Green, Ohio	June	1971	August	1972
Convention Center Room 302, 330	September	'66	June	1971
Bowling Green State University				
Bowling Green, Ohio				

(Use a separate sheet for additional entries)

Exhibit 4 to Hearing in Deportation Proceedings held February 7, 1974 before Chester Sipkin, Immigration Judge

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(8) During the [illegible] in the places in the United States named above I was employed by the following-named persons or firms. (If not employed [illegible] present employment and proceed back to [illegible]. Any periods of unemployment or school attendance should be specified.

Full Name of Employer	Address of Employer	Earnings Per Week (Approximately)	Type of Work Performed	From— Month	From— Year	To— Month	To— Year
Full time student through 1971 - worked some summers doing odd jobs while a student. Presently unemployed.							

(Use a separate sheet for additional answer.)

(9) If self-employed, describe nature of business, name under which business is conducted, its address and net income derived therefrom: n/a

(10) I ☐ AM ☒ AM NOT MARRIED. If married, the name of my spouse is ____ We were married on (Month) (Day) (Year) ____ at (City or town) ____ (State or country)

She or he was born at (City or town) ____ (State or country) on (Month) (Day) (Year) ____ and is a citizen of (Country) ____

(11) (If your spouse is other than a native born United States citizen, answer the following.) She or he arrived in the United States at (City or town) ____ on (Month) (Day) (Year) ____ ☐ was ☐ was not admitted for permanent residence.

was naturalized on (Month) (Day) (Year) ____ (Place naturalized) ____

(12) I ☐ have ☒ have not been previously married. (If previously married, give facts relative to name of each prior spouse, and manner, date, and place of termination of each prior marriage) ____

(13) My present spouse ☐ has ☐ has not been previously married. (If spouse previously married, give facts relative to name of each prior spouse and manner, date, and place of termination of each prior marriage) ____

(14) My spouse ☐ is ☐ is not employed. If employed, give salary and name and address of place of employment ____

(15) The assets of myself (and my spouse), not including clothing and household necessities, are: Self (or jointly owned with spouse):

Cash, Stocks and Bonds	$ 3500	Cash, Stocks and Bonds	$
Real Estate	$	Real Estate	$
Other (Describe)	$	Other (Describe)	$
Total	$ 3,500	Total	$

(16) I have 07 children. Give information requested in each column:

Name	Age	Place of Birth	How Residing at—	Citizen of	Living Permanently Resident of U.S.

The names, assets, and earnings of my children in the United States who have separate incomes are: ____

(17) I ☐ have ☑ have not after entry into the United States acquired the status of an exchange alien.

(18) I ☑ have ☐ have not submitted yearly address reports as required by the amendment to the Alien Registration Act effective September 27, 1950, and the Immigration and Nationality Act.

(19) I ☐ have ☑ have not been the recipient of public or private relief or assistance. If you have, give full details including date, place, and amount received _____

(20) If you have served in the Armed Forces of the United States, state branch (Army, Navy, & service number, etc.) n/a

Date and place of entry on duty _____ Date of discharge _____

Type of discharge (honorable, dishonorable, etc.) _____ I served in active duty status from _____ to _____.

(21) If male, did you register under the Selective Service (Draft) Law of 1917, 1918, 1940, 1948, 1951, or later Draft Laws? Yes ☐ No ☐

If "Yes," give date, Selective Service number, local draft board number and your last draft classification. n/a

Were you ever exempted from service because of conscientious objection, alienage, or any other reason? Yes ☐ No ☐

(22) Have you ever deserted from the military or naval forces of the United States while this country was at war? Yes ☐ No ☐ n/a

(23) Have you ever left the United States or the jurisdiction of the district where you registered for the draft to avoid being drafted into the military or naval forces of the United States? Yes ☐ No ☐ n/a

(24) Are membership, past or present, in all organizations, societies, clubs, unions, and associations, whether in the United States or a foreign country, and the periods and places of such membership. Include membership in any Communist Party or organization or in any section, subsidiary, branch, affiliate, or subdivision of any such party or organization:

none

(25) I ☐ have ☑ have never (either in the United States or any other country) been arrested, summoned into court as a defendant, committed, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public law or ordinance.

If answer is in the affirmative in any particular, give complete information in the space immediately following _____

(Use a separate sheet for additional entries.)

(26) I can return to my country of ☐ Birth ☐ Nationality ☐ Last Residence without fear of persecution. If unable to return to any

(Check the appropriate block or blocks)

of these countries, give reasons unable to return to either country of birth or nationality because of immigration laws and ethnic background

(27) I ☐ would ☑ would not be able to arrange a trip outside the United States to obtain an immigrant visa. If not, explain: same as (26) - the laws of both country of birth and nationality make it illegal.

(28) Give the requested information about your parents, brothers, and sisters. As to residence, show street address, city, and state, if in the United States; otherwise show only country.

	Name	Relationship To Me	Now Residing At	Birthplace	Country Or Countries Of Which Subject Or Citizen	Country Possessing Control Of U.S.
1	Mrs. Rukmha Devi Chadha	mother	in England	India	Great Britain	no
2	Balraj Chadha	brother	in England	Kenya	Britain	no
3	Kewal K Chadha	brother	in Kenya	Kenya	Britain	no
4	Dev Vrat Chadha	brother	in England	Kenya	Britain	no
5	Mrs. Krishana Sothi	sister	in Kenya	kenya	Kenya	no
6	father deceased					

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IF THIS APPLICATION IS BASED ON HARDSHIP TO A PARENT OR PARENTS, QUESTIONS 29 TO 32 MUST BE ANSWERED.

(29) As to such parent who is not a citizen of the United States, give date and place of arrival in the United States including full details as to manner and terms of admission to this country _____

(30) My father ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(31) My mother ☐ is ☐ is not employed. If employed, give salary and place of employment _____

(32) The assets of my parents (not including clothing and household necessities) are:

Assets of father consist of the following:		Assets of mother consist of the following:	
Cash, Stocks and Bonds	$	Cash, Stocks and Bonds	$
Real Estate	$	Real Estate	$
Other (Describe)	$	Other (Describe)	$
Total	$	Total	$

(33) The following certificates or other documents are attached hereto as a part of this application: (Refer to instruction 3 for documents which must be attached.)

Nature of Document	
Affidavit - Paul Terrell	Statement of Hardships
Affidavit - Meaveen Sague	Explanation of trip to Expo
Affidavit - Jagdish Chadha	Letter from Kenya Embassy
Degree of Master of Arts	Leter from British Consulate
Degree of Bachelor of Science Business Administration	

(APPLICATION NOT TO BE SIGNED BELOW UNTIL APPLICANT APPEARS BEFORE AN IMMIGRATION JUDGE)

I do swear (affirm) that the contents of the above application, with corrections numbered ( ) to ( ), and including the documents attached hereto, are true to the best of my knowledge, and that this application is now signed by me with my full, true name. So Help Me God.

X /s/ Jagdish Chadha
Jagdish Chadha
(Complete and true signature of applicant or person on whose)

Subscribed and sworn to before me by the above-named applicant on this 7th day of January, 19 74.

/s/ Chester S. Pitkin
Immigration Judge

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COUNSEL'S STATEMENT OF HARDSHIPS

If the Application for Suspension of Deportation is denied unreasonable complications and undue hardships would ensue in the life of Jagdish Chadha. The seven years that Mr. Chadha has been an inhabitant of the United States has constituted a period of time in which has occurred his complete cultural and societal integration with American norms of living. This is an especially important factor to take into consideration in light of the permanent clevage from his immediate family members that this prolonged U.S. habitancy has created. Mr. Chadha's adaptation to life here has included strong personal ties to friends and also a formal engagement to be married that accentuate his necessity of belonging here. The threat of deportation would subject these personal ties to the possibility of cruel disruption.

Mr. Chadha has enriched his intellectual skills while in this country with the final achievement of a Master of Arts degree from Bowling Green State University in Ohio. The prospect of deportation would mean that Mr. Chadha hard-earned degrees would not be able to be professionally utilized or recognized relative to the varying standards of foreign educational/professional licensing systems. Hence deportation would subject him to a situation of precarious economic existence.

Finally, it must be taken into consideration, that a continued limbo status of official non-residency with which Mr. Chadha finds himself, minimizes his opportunity to obtain gainful and meaniful [sic] employment. Employers will not offer him professional long term

employment when his future residency is in doubt. Mr. Chadha assumes a double burden of not being able to forsee subsistence in a foreign country and at the same time not being given the opportunity here to begin to economically support himself and add his talents to our national progress.

With these reasons I urge swift positive action by the Court on Mr. Chadha's application for Suspension of Deportation.

STEVE R. MITTLEMAN,
Attorney at Law,
302 Precita Avenue, San Francisco 94110.

AFFIDAVIT OF JAGDISH RAI CHADHA

JAGDISH RAI CHADHA, being duly sworn says:

I was born in Kenya and came to the United States in September of 1966 for higher education. I am of Indian origin and traveling on a British passport. I got my B.S. and M.A. at Bowling Green Ohio. My student visa had expired in June 1972.

Upon completion of my studies in Ohio I was not allowed either by Kenya or England to enter as a permanent resident and as a result I was stranded in this country. I was in touch with immigration authorities of Ohio as well as California and from time to time I was told that I had to find an employer who would sponsor me here as a permanent resident. Unfortunately I have not been successful so far.

In case I am asked to leave this country I shall face many hardships: (a) Both Kenya as well as Great Britain do not want me or people of my ethnic background [sic]. This is their immigration policy. As they

did not allow me to enter those countries I have no desire to go there. I do not want to subject myself to any economic, racial or political hostilities. I do not find such hostilities here in the United States.

(b) I have been here seven years and I have considered this country to be my home. All my friends are in this country and that makes living in this country very worthwhile.

(c) I got my education in an American institution and I am well familiar with ways and life-style of people. In fact, I am well adjusted to the entire American philosophy of living.

(d) And most important I am engaged to an American citizen—Miss Meaveen Sague—and we contemplate getting married sometime in the future. It would be indeed a hardship for both of us if we are separated at this stage of our involvement.

(e) All my family members are scattered. Two of my brothers and my mother live in England. My oldest brother and sister are in Kenya and very soon they will leave that country to go somewhere else. So I have no permanent home to where I can return. The only home I have known for the past seven years has been this country. It would be extremely difficult for me to start afresh in some other country. I stayed in England for 12–14 days and that was enroute to the U.S.A. East Africa is out because Asians as well as Europeans are facing a very uncertain and unstable period. The events in Uganda (in 1973) have frightened many immigrant communities in those countries and that is why Asians want to leave those countries.

In conclusion I would like to say that I am very

well integrated into American culture and given an opportunity I would like to contribute to the welfare of this country, after all I owe a great deal to the American people.

JAGDISH RAI CHADHA.

Subscribed and sworn to before me on Feb. 7, 1974.

DIANA K. RHOTEN,
Notary Public—California.

AFFIDAVIT OF PAUL TERRELL

PAUL TERRELL, being duly sworn says:

That I am a citizen of the United States of America.

My wife and I have known Jagdish Chadha for nearly two years. He is now perhaps our most trusted family friend—and without doubt, the favorite adult friend of our 3½ year old son, Joshua.

Concerning Jagdish's potential for constructive residence here, I can unhesitantly attest to his high standard of personal conduct. On occasion since we have known him, Jagdish has taken care of our home while we have been traveling, and has also taken care of Joshua, for less extensive periods. We know him well, and though it sounds stilted to reel off the adjectives, he is an intelligent, hard working, honest, and particularly conscientious individual. I am certain that he will have no difficulty obtaining productive employment as soon as he is legally permitted to do so. My wife and I have been considerably impressed, in our personal relationship with Jagdish, by his consistent generosity, humor, and positive attitude, despite the limbo existence he has endured while his status has been in question.

We feel great warmth toward Jagdish as an individual, and have the highest respect for his capabilities. We sincerely hope that he will be enabled to realize his potential here, and be permitted to settle into a more stable and secure existence.

If there is any additional way in which I can be of help, please do not hesitate to contact me.

PAUL TERRELL.

Subscribed and sworn to before me on Feb. 7, 1974

DIANA K. RHOTEN,
Notary Public—California.

AFFIDAVIT OF MEAVEEN SAGUE

MEAVEEN SAGUE, being duly sworn says:

I am a citizen of the U.S.A.

I have known Jagdish Chadha for seven years now. We met in college a [sic] Bowling Green University in Ohio. I came to California in 1971 while he finished his masters degree in Ohio. He later joined me here in 1972. We are engaged to be married, but have not as yet set a date.

Although I may be biased I believe that my attitude toward him and opinions concerning his character are both very objective and real. Just about everyone who has ever met Jagdish since I have known him has immediately taken a liking to him. He is and [sic] extremely warm and generous person.

Intelligence is a matter of definition, but I do consider Jagdish a man of great intelligence. He is a deep thinker and has shown outstanding insight. He has applied himself and worked hard. In college he had a

leadership position—head of the International Men's Dormitory. He took that job very seriously and showed a great capacity and ability to carry out important responsibilities. Before that he was a teacher, at which time I didn't know him, but his friends and family have said that he was quite a good teacher.

Since he has been in California he has been unable to work at any job because of the restrictions put upon him by the immigration authorities. He has spent most of this time helping other people in various capacities. Needless to say it has been a rather depressing period for Jagdish. He is a man of strong drive and hasn't been able to move in any direction in terms of career during this last year.

As an individual Jagdish would be a great asset to this country. He is very americanized and has the country's good at heart. One of his biggest goals is to contribute to the improvement of the United States. He belongs here more than he belongs in any other country. He has received most of his education here and all of his friends are here.

If Jagdish is deported it would be a great hardship for both of us. I have a very good job as a teacher in the Richmond School District and would hate to go to another country to live, leaving my family and friends and a job that I love. Also there would be the problem of my establishing a citizenship in another country if I went with him. We are deeply committed to each other and want to be together in this country. I sincerely hope that the immigration authorities will realize that it is to my and Jagdish's advantage, as

well as to this country's advantage, to grant him his United States citizenship.

If there is any additional information or help that I can give, please contact me.

MEAVEEN SAGUE.

Subscribed and sworn to before me on Feb. 7, 1974.

DIANA K. RHOTEN,
Notary Public—California.

BRITISH CONSULATE GENERAL,
Chicago, Ill., May 10, 1972.

MR. JAGDISH CHADHA
327 East Court Street
Apartment C
Bowling Green, Ohio

DEAR MR. CHADHA: Thank you for your further letter of 1 May.

I have now received a reply from the competent British authorities concerning your eligibility for a Quota Voucher for employment in the United Kingdom. I am advised that if you were to make an application for such a voucher through this office it could take at least a year before a voucher were issued. It could take considerably longer, as priority is given to British residents of East Africa whose future residence there becomes uncertain.

I would advise you, therefore, to arrange for your immigrant status here to be regularised, so that you can obtain employment here and remain here indefinitely. You may show this letter to the United States Immigration and Naturalization Service, to support your request for immigrant status here.

For advice on visiting Kenya, you should approach the Kenya Embassy in Washington, and not, as you indicated in your letter, the British High Commission in Nairobi.

Yours sincerely,

M. J. SENSIER,
Vice Consul.

EMBASSY OF THE REPUBLIC OF KENYA.
Washington, D.C., November 12, 1973.

Mr. JAGDISH CHADHA
1210 Masonic Ave., No. 2
Berkeley, Calif.

DEAR MR. CHADHA: I acknowledge receipt of your letter dated 30th October, which was a reply to my letter regarding your immigration status in Kenya.

According to our Immigration Act of 1967, any person who is not a citizen of Kenya (i.e. a person holding a passport of another country) whether born in Kenya or wherever would eventually be required to possess an Entry (work) Permit authorising him to remain in Kenya. You fall under this category and before you would be allowed to remain in Kenya, you would be required to obtain a pass or permit.

Our immigration regulations do not have provision for one being a native while not being a citizen of Kenya. In fact this is the first time I have heard of such a word which does not make sense in our immigration laws.

If you had wanted to remain in Kenya forever, you would have obtained citizenship during 1964–1965

Grace Period. Those like you who did not apply for Kenya citizenship during this period obviously planned to leave in future to a country of their own choice. You are therefore, not Kenya's responsibility.

Yours faithfully,

S. M. KIARIE,
Third Secretary (Consular Affairs).

BRITISH CONSULATE-GENERAL,
San Francisco, Calif., November 29, 1973.

MR. JAGDISH CHADHA
1210 Masonic Avenue, No. 2
Berkeley, Calif.

DEAR SIR: Please refer to your letter of 30 October about entry into Britain and employment therein.

As you know the basis for entry into Britain is on a quota allocation system. At the present time priority for quota vouchers is being given to residents of East Africa whose position becomes untenable. As Mr. Sensier in his letter of 10 May from the Consulate-General, Chicago, stated, the present elapsed time for application to approval of a voucher would be at least a year and possibly much longer. I would suggest therefore that you inform the United States Immigration and Naturalization Service of these facts and seek permission to reside here and to take employment. Any other course, as stated above, would involve a delay of many, many months and possibly several years.

Yours faithfully,

DOUGLAS BROOKFIELD
H. M. Consul.

COUNSEL'S EXPLANATION OF RESPONDENT'S DEPARTURE FROM THE UNITED STATES IN 1967

On September 7, 1967, Respondent left the United States for a period of one week, returning to the United States on September 13, 1967. This trip was a student sponsored (Bowling Green State University) visit to the 1967 Montreal World's Fair. The intent of the Respondent was such that this departure should not be considered as meaningfully interruptive of his continuous presence in the United States.

IN THE MATTER OF JAGDISH RAI CHADHA, RESPONDENT

IN DEPORTATION PROCEEDINGS

DECISION OF THE IMMIGRATION JUDGE

Discussion of Deportability:

The respondent is a native of Kenya, citizen of the United Kingdom, of the East Indian race, age 29, who was admitted to the United States as a student on September 6, 1967 at New York, New York. He was subsequently authorized to remain in the United States as a student until June 30, 1972. He remained thereafter. He has admitted, and I find, that he is deportable as charged.

DISCUSSION OF ELIGIBILITY FOR SUSPENSION OF DEPORTATION:

The respondent has resided in the United States continuously since his entry on September 13, 1967 with the exception of a one week visit to the Worlds

Fair at Montreal, Quebec, Canada from which he returned on September 13, 1967. Checks of local police and Federal agencies do not disclose any arrests. There has been made part of the record the affidavits of two citizens of the United States who have known him during his residence in this country attesting to his good moral character. A character investigation conducted by the Immigration and Naturalization Service revealed nothing adverse to him. I find that he has been a person of good moral character for at least seven years preceding his application for suspension of deportation.

The degree of bachelor of science in business administration was conferred upon the respondent by Bowling Green State University, Ohio on March 21, 1970, and the degree of master of arts by the same university on December 16, 1971. He has not been employed since leaving school because, he says, he has been unable to find work commensurate with his professional qualifications by reason of the fact that he does not have a lawful status in the United States. He has been living on his savings which presently total some $3500 in cash. He is engaged to be married to a citizen of the United States. His father is deceased. He has a mother and two brothers in England and a brother and sister in Kenya.

The respondent has established that it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation. He has stated that his deportation would result in a hardship to him because he has

formed strong personal ties with friends and because it is questionable whether he would be able to utilize his education in other countries.

Because of his race and the difficulties he would face by reason thereof, I am satisfied that his deportation would result in an extreme hardship to him. I am also of the opinion that because of this circumstance, his application for suspension of deportation should be granted as a matter of administrative discretion.

IT IS ORDERED that the deportation of the respondent be suspended under the provisions of Section 244(a)(1) of the Immigration and Nationality Act, as amended.

IT IS FURTHER ORDERED that if Congress takes no action adverse to the order granting suspension of deportation, the proceedings be cancelled and that appropriate action be taken pursuant to Section 244(d) of the Immigration and Nationality Act, as amended.

IT IS FURTHER ORDERED that in the event Congress takes action adverse to the order granting suspension of deportation these proceedings shall be reopened upon notice to the respondent.

CHESTER SIPKIN
Immigration Judge.

TRANSCRIPT OF HEARING IN DEPORTATION PROCEEDINGS HELD ON AUGUST 4, 1976 BEFORE CHESTER SIPKIN, IMMIGRATION JUDGE

The IMMIGRATION JUDGE. Mr. Pohlmann, are you ready to proceed?

Mr. POHLMANN. I am, Your Honor.

The IMMIGRATION JUDGE. Mr. Simpson, are you ready to proceed?

Mr. SIMPSON. Yes.

The IMMIGRATION JUDGE. On June 25, 1974, I entered a decision in this case granting the respondent's application for suspension of deportation. However, the House of Representatives passed House Resolution 926 on December 12, 1975, indicating that it did not favor the suspension of deportation in his case. Accordingly, I reconvened the hearing.

Q. Mr. Chadha, you are reminded that you are still under oath to tell the truth, do you understand?

A. (Nods head.)

The IMMIGRATION JUDGE. Mr. Pohlmann, it would appear that the only relief available for the respondent at this time is the grant of voluntary departure. Do you wish to apply for that privilege on his behalf?

Mr. POHLMANN. No, Your Honor, and at this time I'd like to move that these proceedings be terminated on the grounds that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional in that it is in contravention to Article 1, Section 7, of the Constitution in that it's violative of the separation of powers doctrine.

The IMMIGRATION JUDGE. You mean the suspension of deportation procedure is invalid?

Mr. POHLMANN. No, the Congressional review as provided for in Section 244(c)(2).

The IMMIGRATION JUDGE. Well where will that leave us? I am not quite certain. If it is unconstitutional where would that leave the respondent?

Mr. POHLMANN. He would have the grant of suspension of deportation.

Mr. SIMPSON. Not necessarily, counsel, because as we discussed preliminarily if you are successful and it has the affect of extinguishing the right of suspension of deportation under any and all circumstances—in other words the entire procedure is declared unconstitutional, he will be deportable.

Mr. POHLMANN. Section 406 of the Act would allow the separability of Section 244(c)(2) from the remaining portions of Section 244 and would not require the complete abandonment of the concept of suspension—the concept or the act of suspension of deportation.

The IMMIGRATION JUDGE. I am not sure that I agree with you, Mr. Pohlmann. It would seem to me that the whole suspension procedure is a package deal and if the Congressional review aspect is found unconstitutional it would follow that the whole section would become inoperative. You may be right but this is how it appears to me. But in any event, Mr. Pohlmann, as you know I have no authority to decide the constitutionality of statutes and if you don't apply for voluntary departure the only alternative I will have is to enter an order for the respondent's deportation.

Mr. POHLMANN. We understand that, Your Honor.

The IMMIGRATION JUDGE. Is there anything else you want to say at this time?

Mr. POHLMANN. No, Your Honor.

The IMMIGRATION JUDGE. Mr. Simpson, is there anything you want to say or bring out?

Mr. SIMPSON. No, I don't believe under the circumstances it is necessary. The Service is obviously taking the position in this particular case that as the section is constitutional and Congress has the power to set conditions subsequent on the grant of suspension of deportation in this case the approval or disapproval.

The IMMIGRATION JUDGE. I might say, however, Mr. Pohlmann, for whatever advantage it might bring to you, that I agree with you that the Congressional review of a decision of the executive branch of the Government which I represent would be unconstitutional.

Mr. POHLMANN. Thank you, Your Honor.

The IMMIGRATION JUDGE. I will now render my decision. Before I render my decision, counsel, there is no definite designation of the country of deportability. In the event I order the respondent's deportation, and I intend to order that he be deported, do you wish to designate the country of deportability?

Mr. POHLMANN. No, Your Honor, we will not designate a country.

The IMMIGRATION JUDGE. All right, Mr. Pohlmann, in the event—well I said I was going to order him deported—in my decision I propose to order that he be deported to the United Kingdom of which he is a citizen. If you think that he will be persecuted in that country you can either apply for asylum to the District Director or you can apply for the withholding of deportation under Section 243(h). Do you wish to apply?

Mr. POHLMANN. We will reserve that right, Your Honor, at this time.

The IMMIGRATION JUDGE. I will give you a period of ten days within which to submit applications. If you do not do so either to the District Director for asylum or to me for Section 243(h) relief I will consider that you have waived your right to apply. If you do apply for asylum I will refer the case to the District Director and he can consider the asylum question. After which, if necessary, it will be referred to me for the 243(h) application.

The hearing is closed.

I hereby certify that to the best of my ability and belief the foregoing pages numbered 1 through 4 are a complete and accurate transcript of the above direct recorded hearing.

BESSIE M. MINOR
Closed Microphone Reporter.

AUGUST 5, 1976.

IN THE MATTER OF JAGDISH RAI CHADHA, RESPONDENT

IN DEPORTATION PROCEEDINGS

DECISION OF THE IMMIGRATION JUDGE

On June 25, 1974, I entered a decision in this case finding the respondent deportable on the charge in the Order to Show Cause, but granted his application for suspension of deportation under the provisions of

Section 244(a)(1) of the Immigration and Nationality Act, as amended. In my order I provided that in the event Congress took action adverse to the order granting suspension of deportation, the proceedings were to be reopened. On December 12, 1975, the House of Representatives passed House Resolution 926 indicating that the House did not favor suspension in the case of the respondent. Accordingly, the proceedings were reopened.

At the reopened hearing, the respondent moved that the proceedings be terminated contending that Section 244(c)(2) which, in effect, provides for congressional review of decisions granting suspension of deportation, is unconstitutional because it is violative of the separation of powers doctrine.

It appears to me that the respondent has a point. However, I have no authority to pass on the constitutionality of acts of Congress. Since he has not applied for voluntary departure, an order for his deportation will have to be entered.

Although the respondent is a native of Kenya, he is a citizen of the United Kingdom, and I designated the United Kingdom as the place of deportability. He then claimed that he would be persecuted if deported to that country. He was given a period of ten days within which to apply to the District Director for asylum or to me for the withholding of his deportation under Section 243(h) of the Immigration and Nationality Act. He did not file either of such applications.

IT IS ORDERED that the respondent be deported from the United States to the United Kingdom on the charge set forth in the Order to Show Cause.

CHESTER SIPKIN
Immigration Judge.

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS, IMMIGRATION AND NATURALIZATION SERVICE

File No. A17 385 958 San Francisco, California

IN THE MATTER OF CHADHA, JAGDISH RAI

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated November 8, 1976 in the above entitled case.

2. Briefy, state reasons for this appeal: Section 244(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1254(c)(2)) is unconstitutional in that it provides for legislation inconsistent with and in contravention of Article I, Section 7 of the United States Constitution and is violative of the separation of powers, doctrine contained in Article I, Section 6 of the United States Constitution. The Deportation proceeding from which this appeal is taken should have been terminated.

3. I do not desire oral argument before the Board of Immigration Appeals in Washington, D.C.

4. I am not filing a separate written brief or statement.

JOHN M. POHLMANN
517 Washington St.
San Francisco, Calif.

NOVEMBER 11, 1976.

UNITED STATES DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS,
Washington, D.C., February 11, 1977.

File: A17 385 958—San Francisco
In re: Jagdish Rai Chadha
IN DEPORTATION PROCEEDINGS
APPEAL ON BEHALF OF RESPONDENT: John M. Pohlmann, Esquire
517 Washington Street, San Francisco, CA 94111.
ON BEHALF OF I&N SERVICE: Brian H. Simpson, Trial Attorney.
CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Nonimmigrant student—remained longer than permitted.

APPLICATION: None.

This case comes forward on appeal from an order of an immigration judge finding the respondent deportable under the provisions of section 241(a)(2) of the Immigration and Nationality Act and ordering his deportation since he declined to make an application for any relief. The appeal will be dismissed.

On appeal the respondent contended that the invocation by the United States Congress of the provisions of section 244(c)(2) of the Act in denying him relief under section 244(a)(1) of the Act is unconstitutional.

This argument is without merit. We have no power to declare unconstitutional an act of Congress, *Panitz v. District of Columbia,* 112 F.2d 39 (D.C. Cir. 1940); *Matter of Santana,* 13 I&N Dec. 362

(BIA 1969); *Matter of L-*, 4 I&N Dec. 556 (BIA 1951). Moreover, we have held that "Congress has the absolute and qualified power to prescribe the conditions under which an alien may enter the United States," *Matter of Santana,* supra. In the circumstances, we have no alternative but to affirm the decision of the immigration judge and dismiss the appeal.

ORDER: The appeal is dismissed.

DAVID L. MILHOLLAN
Chairman.

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Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

October Term, 1980

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

v.

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et al.,
Respondents.

UNITED STATES SENATE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et. al.,
Respondents.

MEMORANDUM OF APPELLEE/RESPONDENT JAGDISH RAI CHADHA

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July 20, 1981

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IMMIGRATION AND NATURALIZATION SERVICE,
et al.,
Respondents.

UNITED STATES SENATE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
et. al.,
Respondents.

MEMORANDUM OF APPELLEE/RESPONDENT JAGDISH RAI CHADHA

This memorandum is submitted by the appellee/respondent Jagdish Rai Chadha ("respondent") to set forth his position regarding these three pending cases all seeking review of a decision granting his petition to review a decision of the appellant/respondent Immigration and Naturalization Service ("INS"). The INS agreed that

Chadha was entitled to adjust his status to that of a permanent resident alien pursuant to 8 U.S.C. § 1254, but when that determination was overriden by the House of Representatives pursuant to 8 U.S.C. § 1254(c)(2), the INS ordered Chadha deported. For the reasons set forth below, Chadha agrees that this Court should hear the merits of the constitutional challenge to the legislative veto, but urges the Court to refuse to grant review on the procedural issues raised by the House of Representatives and the Senate. Since the facts are not in dispute and are fully covered in the statements of the case filed by the INS, the House, and the Senate, as well as the court below, they will not be repeated here.

REASONS FOR REVIEWING ONLY THE CONSTITUTIONALITY AND SEVERABILITY OF THE LEGISLATIVE VETO

There are four general categories of issues presented for consideration by this Court in these three related proceedings. In respondent Chadha's view, the Court should agree to hear only the constitutional challenge to the legislative veto and the closely related question of the severability of the veto from the remainder of section 1254.

A. The first question, which is raised by the motions to dismiss filed by the Senate and the House, asks the Court to rule on whether the United States may rely on 28 U.S.C. § 1252 to appeal a decision when it supports the ruling below. As the motion to dismiss filed by the Senate acknowledges (pp. 3-5), there are some situations in which the Attorney General may seek appellate review of a decision with which he agrees on the merits, in order to insure that this Court may pass on important constitutional questions. Thus, the only issue is whether this case is controlled

by cases such as *United States v. Lovett*, 328 U.S. 303 (1946), in which the Executive Branch sought and obtained review in this Court of a ruling of the Court of Claims that it supported, holding unconstitutional an act of Congress. In light of the petitions for certiorari filed by both the Senate and the House of Representatives, both of which raise the same constitutional questions presented in the appeal of the INS, it is not clear that the jurisdictional question must be resolved. In any event, respondent Chadha takes no position on the merits of the section 1252 question, but he does believe that it does not warrant plenary consideration by this Court, especially since it would divert the attention of the parties and the Court from the vital constitutional questions which are properly presented.

B. Second, both the Senate and the House contend that respondent Chadha should have sued in a district court, where a single federal judge would have passed judgment on this momentous constitutional question, rather than filing directly in a court of appeals. The court below dealt with the contention in great detail (4a-11a), and its decision is plainly correct. The only discussion of this issue by either petitioner is contained in a single paragraph on page 22 of the petition of the House of Representatives, which simply asserts that the court below was in error. Even if that were correct, it is not a sufficient reason, standing alone, for this Court to grant certiorari on that question. Therefore, the question of whether this case was improperly filed in a court of appeals should not be reviewed by this Court.

C. The third group of issues are procedural arguments, the effect of which, if accepted, would bar the doors of the federal courts to an individual who was about to be deported based upon an unconstitutional act of the House

of Representatives. Without disputing that deportation of Chadha would plainly cause him injury in fact, the House and Senate nonetheless claim that he lacks standing because the separation of powers and other constitutional doctrines on which he relies were not intended to benefit deportable aliens, and thus they cannot bring suit based on them. Similarly, both Houses argue that his claim is also precluded as a nonjusticiable political question. The court below carefully considered and correctly rejected each of these arguments (19a-22a), and nothing in either petition suggests any reason for this Court to review those rulings.

Related to the standing and political question arguments is the claim by the House and the Senate that since respondent Chadha and the INS agreed that the veto was unconstitutional, the court of appeals had no power to grant the relief sought because there was no case or controversy within the meaning of Article III of the Constitution. However, petitioners overlook the fact that the INS asserted that, absent a court order, it was obliged to deport Chadha, and hence, at least as to the question of whether he was entitled to judicial relief from the deportation order, sufficient adversity existed to permit the court to direct the INS to cancel Chadha's deportation order. *Cf. GTE Sylvania Inc. v. Consumers Union of the United States*, 445 U.S. 375, 382-83 (1980). Moreover, petitioners' argument, if accepted, would mean that respondent Chadha would be denied an opportunity to bring his constitutional challenge to the deportation order because his adversary, the INS, agreed with him, but that he would have been permitted to seek relief from deportation if the INS had argued that the veto was constitutional. Surely nothing in Article III dictates such an irrational result.

Moreover, by the time of oral argument in the Ninth Circuit, both the Senate and House had filed briefs sup-

porting the statute, and both argued in that court. Thus, the court was plainly correct in finding the requisite adverseness (22a-24a) as this Court would be, especially now that the Senate and House have intervened and have sought review in this Court on the merits of the constitutional ruling.

The House and Senate also urge this Court to grant review on another question designed to avoid a decision on the merits. They contend that the court of appeals should have remanded the case to the INS for further consideration in light of the fact that Mr. Chadha had married a U.S. citizen. Although the constitutional issue might have been avoided in this case had Chadha's status been adjusted because of his marriage, to have done so would have denied Chadha the full relief to which he was entitled. Because of the time it took the House to veto his status adjustment and the court below to decide his case, more than five years have elapsed since his status was originally adjusted by the INS, and hence, as the court of appeals found (17a-18a, n.6) and the INS has not disputed, he is immediately eligible for U.S. citizenship. On the other hand, approximately four additional years would be required for him to become a United States citizen if he sought that status based on his wife's citizenship. There is simply no basis to deny Chadha's right to be a U.S. citizen for four years simply to avoid deciding a constitutional question which surely will be presented in other cases in which a similar adjustment of status under section 1254 has been vetoed by one House of Congress. *See e.g.*, H. Res. 817, 96th Cong., 2d Sess., *approved,* 126 Cong. Rec. H 11747 (Daily ed. Dec. 3, 1980).

Accordingly, we urge the Court to refuse to consider all of the questions which seek to avoid a decision on the

merits since none of them is worthy of plenary consideration by this Court.

D. Respondent Chadha agrees, however, that the constitutional question presented is substantial and that the result is not plainly foreclosed by prior decisions of this Court. He believes that, while the court of appeals was absolutely correct in rejecting the congressional defense based on the "necessary and proper" clause of the Constitution, and in finding a violation of separation of powers principles, it would also have been correct in striking down the veto as a violation of the presentment clause in Article I, Section 7 and as contrary to principles of bicameralism. Since respondent intends to rely on these arguments in this Court, as he did below, it may be helpful to the Court to summarize his position briefly at this stage as a further indication of the nature of the constitutional challenge.

The doctrine of separation of powers precludes one branch of government, here the legislature, from overruling the actions of another, here the executive. The sole exception arises where there is a specific check or balance written into the Constitution, such as the role of the President in the legislative process, or that of the Senate in appointments and treatymaking. Admittedly, there is no such specific check or balance available to Congress here.

The principal purposes behind separation of powers are to prevent the undue accretion of power in a single branch and to assure that the branch to which the power is delegated retains control over it. As the court below recognized, it is necessary to examine the precise statutory scheme in order to determine the function of the veto in it, and then to measure the roles assumed by Congress in exercising the veto within the separation of powers framework.

Under this analysis it is plain that the veto here is unconstitutional. Thus, if the House of Representatives were reviewing the INS' interpretation of section 1254, but disagreed that Chadha fell within its mandate, it was performing a judicial, not a legislative, function which it is not permitted to do. On the other hand, if the House were seeking to share responsibility for, or control the exercise of, the discretionary power of the INS to adjust the status of aliens under section 1254, it was attempting to execute the laws itself, which is an impermissible function for the Congress to perform. Thus, viewed either as a judicial or executive act, the veto violates the principles of separation of powers. And if the veto is instead seen as a legislative activity, it is also unconstitutional since the enactment of legislation requires the concurrence of both Houses of Congress and an opportunity for the President to sign the legislation or veto it. Since the only constitutionally-permitted method of passing legislation was not utilized, the veto is extra-constitutional and unauthorized.

Moreover, there is no residual, non-legislative power in Congress to change policy regarding aliens. To hold otherwise would deprive the President of his right under Article I, Section 7 to participate in all policy decisions of a legislative character affecting the public. Similarly, the "necessary and proper" clause, Article I, Section 8, Clause 18, is of no help since it authorizes only laws that do not violate other provisions of the Constitution, such as those requiring separation of powers. Furthermore, as the court of appeals correctly concluded (56a), Congress' power under that clause is only to "make all laws" and "not to exercise power in any way it deems convenient."

Quite apart from separation of powers issues, the one-House veto transgresses principles of bicameralism. The powers of Congress are confined to those enumerated in

the Constitution, and the history behind the creation of a bicameral Congress demonstrates that, except for powers specifically assigned to one House in the Constitution itself (such as those in Article II, Section 2, Clause 2 relating to appointments and treaties), neither House has the power to act in a way that affects the public except with the concurrence of the other.

Finally, even if the action of the House does not violate any of these specific constitutional guarantees, it still must fall since the authority for the veto constitutes an undue delegation of legislative power. *See Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *American Textile Mfgs. Institute, Inc. v. Donovan,* ___ U.S. ___, 49 U.S.L.W. 4720, 4734-36 (1981) (Rehnquist, J. and Burger, C.J., dissenting). Since the veto in section 1254(c)(2) can be exercised without any standards and without judicial review, it would plainly be improper if granted to an administrative agency. Although the veto was exercised by elected representatives, they were not functioning in a legislative capacity and cannot claim the protection of legislative freedom since the necessary checks and balances to the unfettered discretion of the House of Representatives – participation by the Senate and President – were lacking.

Respondent Chadha also agrees that the issue of whether the veto is unconstitutional is closely related to the question of whether that provision is severable from the remainder of the statute upon which he relies to adjust his status. This Court has examined severability questions whenever constitutional challenges have been presented, and respondent acknowledges that if the Court decides to review the merits of the constitutional claim, this severability issue should also be decided.

CONCLUSION

For the foregoing reasons, the Court should agree to hear the constitutional challenge to the legislative veto in 8 U.S.C. § 1254(c)(2) and the related issue of its severability. The remaining questions presented in the petitions for certiorari – numbers 1-4 in No. 80-2170 and numbers 1 and 4-7 in No. 80-2171 – should specifically be excluded from plenary consideration by this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE UNITED STATES SENATE TO DISMISS

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE UNITED STATES SENATE TO DISMISS

Appellee United States Senate moves to dismiss this appeal on the ground that it is brought by a party that prevailed in the court of appeals and thus is not properly presented to this Court. The facts and the statutes involved are set forth fully in the jurisdictional statement of the appellant in this case and in the petition for certiorari filed simultaneously with this motion by the United States Senate. The motion to dismiss is pursuant to Rule 16.1(a) and (d) of this Court.

This appeal has been brought by a party that prevailed in the court of appeals, in violation of one of the most elementary rules of appellate practice and jurisdiction.[1] In the court of appeals, the Immigration

[1] The Immigration and Naturalization Service brought this appeal under 28 U.S.C. 1252, which affords an appeal to this Court as of right in a case where an Act of Congress has been

and Naturalization Service ("INS") agreed with appellee Chadha that Section 244(c)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(c)(2), was unconstitutional. The United States Senate and House of Representatives ("congressional appellees") appeared as amici curiae to defend the statute. INS's argument was successful and the court of appeals declared the statute unconstitutional. Following judgment, the congressional appellees intervened as parties, seeking, at first, rehearing, and when that was denied, petitioning this Court for certiorari.

Although INS prevailed below, it has also appealed, not seeking to present this Court with errors in the judgment below, but requesting that this Court affirm that judgment. As this Court noted only last year, "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 333 (1980). This Court consistently enforces that elementary rule by dismissing appeals like INS's filed by the party which prevailed in the court below. See, e.g., *Public*

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declared unconstitutional. It is settled that statutes like 28 U.S.C. 1252 are meant only to assure that the aggrieved party has an appeal as of right, not to disrupt the orderly adjudication of such cases by allowing prevailing parties to appeal. *See Gunn* v. *University Committee To End The War In Viet Nam*, 399 U.S. 383, 390 n.5 (1970).

Such statutes do not authorize the party prevailing on a challenge to the constitutionality of a statute to appeal even when that party is technically aggrieved because it loses the case on another issue. *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U.S. 376, 377–78 (1903) (dismissing appeal by party whose challenge to statute succeeded, because "[w]ith regard to the [constitutional] ground, the decision of the Circuit Court again was in favor of the plaintiff, and it has nothing of which to complain.")

Service Commission v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) ("The Public Service Commission as the successful party below has no standing to appeal. . . ."); *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 176 (1934); *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934).[2] For this Court to open its jurisdiction to appeals by prevailing parties would lead to the Court's reviewing opinions rather than judgments[3] and to its aiding parties without any concrete needs. It would reduce the finality of the judgments of the court of appeals while needlessly expanding this Court's docket, and would similarly disrupt, by extension of the principle, the relations of the courts of appeals and the district courts, all to the detriment of the proper functioning of the appellate system.

Prior to this case, the past experience in the rare cases involving the executive and legislative branches has been for one branch to appear as a party and the other as an amicus curiae, and for the Department of Justice to appeal if necessary to obtain appellate review for the *aggrieved* branch. For example, in *United States* v. *Smith*, 286 U.S. 6 (1932), the Senate

[2] The same practice applies under the certiorari statute, 28 U.S.C. 1254(1). Indeed, "while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court . . . has granted a petition filed by a party who prevailed on the merits in the court of appeals." R. Stern & E. Gressman, SUPREME COURT PRACTICE 58 (5th ed. 1978).

[3] An appellant who prevailed below will not complain of error in the judgment in the court of appeals, only of statements in the opinion with which it disagrees. However, "[t]his Court . . . reviews judgments, not statements in opinions." *Federal Communications Commission* v. *Pacifica Foundation, Inc.*, 438 U.S. 726, 734 (1978), *quoting Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

was the aggrieved branch.[4] Accordingly, the United States Attorney for the District of Columbia instituted the proceeding on behalf of the Senate; the Attorney General appeared in opposition in the Supreme Court as amicus curiae. See 286 U.S. at 26, 29–30.

Following this pattern, in *United States* v. *Lovett*, 328 U.S. 303 (1946), federal employees, supported by the executive branch, challenged in the Court of Claims a statute denying them salaries. The House of Representatives adopted a resolution authorizing counsel to appear as amici curiae to defend the statute. A majority of the Court of Claims, in separate opinions, declared the statute unconstitutional. Since it represented the only governmental party in the case, the Department of Justice petitioned for certiorari. However, as the Solicitor General's brief in this Court carefully explained, the petition was filed to obtain review sought by amici representing the House, the aggrieved branch, as the challenger of the lower court's judgment.[5] Consistent with the petition

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[4] The Senate challenged respondent Smith's right to hold office after the Senate reconsidered his confirmation. The Attorney General supported respondent since the reconsideration occurred after notification of the President of the confirmation. *Compare* 286 U.S. at 7, *with id.* at 14.

[5] The Solicitor General explained in his brief:

> "The United States, against which judgments were rendered in the court below, has sought review of these cases because of the Government's belief that important constitutional issues are involved which should be determined by this Court and because *amici curiae*, representing the Congress (see *infra*, p. 8), having no independent means of access to the Court, requested that a petition for writs of certiorari be filed. . . . [¶]The *Amici curiae* contend that the [statute] is a valid exercise of the legislative power and that the judgments below are wrong. *The leg-*

for certiorari being filed at the behest of counsel for the House as the losing branch in the Court of Claims, two of the four questions presented, including one preliminary question about the justiciability of the case, were posed at the request of counsel for the House.[6]

The appellant is not utilizing these historical models. The INS's appeal is not for the purpose of enabling the Congress, as the aggrieved branch, to obtain review of the judgment of the court of appeals, but rather to enable the INS to obtain a repetition of that judgment. INS has notably failed to present to this Court the threshold questions which the congressional appellees believe would make it unnecessary to decide the constitutional issue in this case.

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islative branch which they represent *is therefore the challenger of the judgments below.*"

Brief for Petitioner at 2–3, *United States* v. *Lovett*, 328 U.S. 303 (1946) (emphasis supplied).

[6] The Solicitor General's brief stated:

"The questions presented in this Court are:

"1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services in their government positions. . . .

"2. If the former, whether Section 304 is unconstitutional. . . .

"3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder prior to November 15, 1943, the United States incurred a legal obligation to pay respondents for services rendered after that date.[1]

"(4). Whether the Court of Claims was presented with justiciable controversies.

"[1] *Questions 3 and 4 are stated at the request of counsel for the subcommittee of the House Committee on Appropriations.*"

Brief for Petitioner at 3, *United States* v. *Lovett*, 328 U.S. 303 (1946) (footnote in original) (emphasis supplied).

Since the congressional appellees are simultaneously petitioning for certiorari for review of the judgment of the court of appeals, the INS's appeal to review that judgment is superfluous. Moreover, the INS's appeal would have the unfortunate practical effect of diverting the briefing and issues presented to this Court from their proper focus on the errors in the judgment of the court of appeals. Since INS supports the judgment, INS's appeal will not focus on the errors in the judgment, particularly the threshold matters of the need to reach the merits of the case and the critical question of nonseverability.[7] The "Question Presented" by INS, in its jurisdictional statement, addresses only the merits, and the "Statement" by INS relegates the threshold issues to a footnote since INS "agree[s] with the court of appeals' disposition of these issues." Jurisdictional Statement at 7 n.6.[8] In contrast to INS's appeal, the petitions by the congres-

[7] An aggrieved party focuses its appeal on the errors in the actual rationale of the court of appeals, leading to clearly structured appellate briefing and review. In contrast, a non-aggrieved party presents an amalgam of the actual rationale of the court of appeals, and what the non-aggrieved party desired as the rationale. The INS's statement amalgamates the argument against legislative review on bicameralism grounds, which the court of appeals adopted as part of its rationale, with an argument against legislative review on presidential veto grounds, which INS desired as the rationale but which the court of appeals did not adopt. Jurisdictional Statement at 14–18.

[8] INS's jurisdictional statement contrasts sharply with the petition for certiorari filed by the Solicitor General in *United States* v. *Lovett*, *supra*. As discussed above, the petition for certiorari in *Lovett* was filed at the behest of the losing branch below, and so it included a question concerning justiciability which that aggrieved branch sought to pose.

sional appellees, who disagree with the judgment of the court of appeals, will focus this Court's review on the errors in the judgment, particularly on the threshold issues.

To review the judgment of the court of appeals through INS's appeal, rather than through the petitions of the congressional appellees, will thus lead to an irregular briefing of the case. INS's initial brief will naturally not identify the key errors in the judgment of the court of appeals. The congressional appellees will be deprived of their proper procedural right to point out those errors, receive the executive's responsive brief in support of the judgment, and then reply to that brief. In this case, which presents separation of powers issues of major importance, novelty, and complexity, such irregular briefing will be a serious disservice to this Court.

CONCLUSION

Accordingly, this Court should dismiss INS's appeal. Alternatively, this Court should postpone jurisdiction and direct that briefing proceed under the grant of the petitions for certiorari filed by the Senate and the House.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE UNITED STATES HOUSE OF REPRESENTATIVES TO DISMISS

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QUESTION PRESENTED

The question presented by this motion to dismiss is whether an agency of the United States has standing to appeal to this Court under 28 U.S.C. § 1252, which permits "any party" to appeal from a federal court judgment holding an Act of Congress unconstitutional, where

(a) The federal agency was a prevailing party respondent in an administrative review proceeding in which a federal court of appeals invalidated an Act of Congress,

(b) The federal agency joined with the private party petitioner in urging the invalidity of the statute, thereby eliminating any adverseness between the parties on the constitutional question, and

(c) The federal agency claims no grievance as to the form, scope or content of the judgment of unconstitutionality, or as to the relief granted by the court.

PARTIES TO PROCEEDINGS BELOW

Original parties before the United States Court of Appeals for the Ninth Circuit: (1) Jagdish Rai Chadha, an appellee herein; (2) the Immigration and Naturalization Service, the appellant herein. At all times the Immigration and Naturalization Service has been represented by Department of Justice counsel.

Amici curiae before the Ninth Circuit, by invitation of the court: (1) the United States House of Representatives; (2) the United States Senate.

Intervening parties after judgment of the Ninth Circuit: (1) the United States House of Representatives; (2) the United States Senate. As a result of

such intervention, which was granted by the Ninth Circuit, both the House and the Senate are appellees in the instant appeal. See Appendix G of jurisdictional statement, p. 75a. Each House is also filing a petition for certiorari addressed to all the rulings of the Ninth Circuit in this case.

Authorization to intervene on behalf of the House of Representatives was granted to the Speaker of the House by H. Res. 49, 97th Cong., 1st Sess., unanimously agreed to on January 29, 1981, 127 Cong. Rec. H 260 (Jan. 29, 1981, daily ed.). The full text of H. Res. 49 is as follows:

H. RES. 49

IN THE HOUSE OF REPRESENTATIVES, U.S.,
January 29, 1981.

Whereas, on February 27, 1978, a brief amicus curiae was submitted on behalf of the Chairman of the Committee on House Administration in the United States Court of Appeals for the Ninth Circuit in the case of Chadha v. Immigration and Naturalization Service, No. 77–1702, in support of the constitutionality of the legislative review provision in section 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. 1254(c)(2), and on December 22, 1980, the Court of Appeals ruled that this legislative review provision violated the principle of separation of powers and was unconstitutional, and the Department of Justice, although it prevailed before the Court of Appeals, has filed a notice of appeal to the Supreme Court;

Whereas, the United States Court of Appeals for the District of Columbia Circuit is now considering the case of Consumer Energy Council of America et al. v. Federal Energy Regulatory Commission, Nos. 80–2184 and 80–2312 wherein the Department of

Justice has submitted a brief amicus curiae urging that the legislative review provisions of section 202 of the Natural Gas Policy Act, 15 U.S.C. 3342, are unconstitutional, and the Attorney General has suggested that the House submit a brief amicus curiae in support of these legislative review provisions;

Whereas, it is essential that the House be given an opportunity to present fully its views to the appropriate court in both of these cases, either as amicus curiae or by intervention as a party: Now, therefore, be it

Resolved, That the Speaker is authorized to retain counsel and take any steps he considers necessary, including intervention or submission of briefs amicus curiae, to protect the interests of the House before the court in the case of Chadha v. Immigration and Naturalization Service and in the case of Consumer Energy Council of America et al. v. Federal Energy Regulatory Commission.

Attest:

[SEAL] EDMUND L. HENSHAW, Jr.
Clerk.

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IMMIGRATION AND NATURALIZATION SERVICE,
APPELLANT,

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

Pursuant to Rule 16.1, the appellee United States House of Representatives moves to dismiss the appeal filed on behalf of the Immigration and Naturalization Service (hereinafter "INS"). The motion is grounded on the fact that the INS is one of the prevailing and non-aggrieved parties below, in a proceeding in which there was no adverseness whatever between the parties. The INS therefore has no standing to invoke this Court's appeal jurisdiction under 28 U.S.C. § 1252.

STATUTORY PROVISION INVOLVED

In pertinent part, 28 U.S.C. § 1252 provides that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an Act of Congress unconstitutional in any civil action, suit,

or proceedings to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. . . ."

STATEMENT

The jurisdictional problem posed by the INS appeal to this Court is the culmination of the following procedural developments in the Ninth Circuit:

1. In March of 1977, the appellee Chadha filed in the Ninth Circuit a petition for review of a final deportation order issued against him by the INS. The petition named only the INS as respondent, and was filed pursuant to Section 106(a) of the Immigration and Nationality Act of 1952.

2. The petition for review did not question the propriety or legality of the deportation order. Indeed, Chadha at all times has conceded that he is deportable under Section 241(a)(2) of the Act.[1]

3. The sole question presented by Chadha's petition for review was the alleged unconstitutionality of Section 244(c)(2) of the Act, which has nothing to do with the propriety of issuing orders of deportation. Rather, it deals with the important sovereign problem of waiving deportation of an illegal alien, mainly on grounds of "extreme hardship," and allowing such alien to reside permanently in the United States. Section 244(c)(2) prescribes the Congressional procedures for making the final determination respecting such a waiver. A waiver is possible on a discretionary basis only for those deportable aliens who have ap-

[1] Section 241(a)(2) directs the Attorney General to deport any alien who "is in the United States in violation of this chapter." Chadha had been admitted in 1966 as a nonimmigrant student for a limited period only. Having remained in the United States beyond the statutorily prescribed time limit, Chadha became subject to deportation. Chadha concedes he is deportable. See J.S.App. B, p. 65a; J.S.App. D, p. 70a.

plied for and secured from the INS a temporary suspension of deportation, pending Congressional consideration of the matter. Under Section 244(c)(2), either House of Congress can disapprove a waiver; or, if neither House disapproves, the waiver is effective and the alien's status changes to that of a permanent resident alien. In Chadha's case, the House of Representatives on December 16, 1975, disapproved a waiver and the granting to Chadha of permanent residence status. 121 Cong. Rec. 40800. That action, of course, reactivated and finalized the original and uncontested INS order of deportation.

4. Thus it was the discretionary action of the House in disapproving a change in Chadha's deportable status that motivated Chadha's constitutional assault on the Section 244(c)(2) legislative procedures. But Chadha made no claim that Section 244(c)(2) infringed any constitutional or statutory right or privilege that Chadha himself might possess. Instead, Chadha's constitutional complaint was and is that, by enacting the legislative procedures of Section 244(c)(2), Congress exceeded its own constitutional power to legislate and intruded into powers vested exclusively in the Executive Branch. More particularly, as expressed in Chadha's main brief in the Ninth Circuit, the constitutional arguments there advanced were:

> (a) Neither the power to regulate naturalization nor the Necessary and Proper Clause empowers Congress to act in contravention of other provisions in the Constitution;
>
> (b) What Chadha called the "Congressional veto," as provided for in Section 244(c)(2), violates the separation of powers doctrine;
>
> (c) What Chadha called the "Congressional veto" deprives the President of the opportunity

to exercise his veto power under Article I, Section 7; and

(d) What Chadha also called the "one-House veto" provision of Section 244(c)(2) violates the requirement of a bicameral legislature.

5. The INS responded in the Ninth Circuit with a brief that totally agreed with Chadha's constitutional objections to Section 244(c)(2), while adding a few refinements thereto. The brief (p. 7) candidly acknowledged that the INS, as respondent, "agrees with petitioner [Chadha] that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional." The brief then proceeded to make the following constitutional points:

(a) Section 244(c)(2) violates the Article I procedures for enactment of the laws of the United States;

(b) Section 244(c)(2) is an intrusion into executive and judicial powers and functions, all in violation of the separation of powers doctrine; and

(c) Section 244(c)(2) is severable from other provisions of the Act.

6. In addition to the complete agreement between the parties as to the alleged unconstitutionality of Section 244(c)(2), Chadha and the INS were also in agreement in the Ninth Circuit as to what the appropriate relief should be. In the words of the INS brief (p. 36), "this Court should set aside the [INS] order for petitioner's deportation." Setting aside the deportation order carries the necessary implication that the INS, or the Attorney General, will cease and desist from all efforts to deport Chadha.

7. As a result of the opening briefs of the two parties in the Ninth Circuit, it was evident that (a) both parties were in agreement with respect to the

only issue in the review proceeding, i.e., the alleged unconstitutionality of the Section 244(c)(2) procedures, (b) both parties were in agreement as to the appropriate form of relief, (c) the constitutional issue was framed and argued by both parties in terms of a confrontation between the constitutional functions of the Legislative and Executive Branches, and (d) viewing Section 244(c)(2) as an epitomization of that inter-Branch conflict, the Executive Branch (acting through the INS and the Attorney General) was unwilling and incapable of defending the constitutionality of Section 244(c)(2). The Ninth Circuit, perceiving this lack of adverseness between the two parties on a momentous constitutional issue, invited the House of Representatives and the Senate to appear as *amici* to defend the constitutionality of the Section 244(c)(2) procedures. The invitations were accepted, and special counsel were retained to make the defense.

8. Congressional *amici* briefed and argued the constitutional issues. The *amici* also urged various prudential, procedural and jurisdictional reasons why the constitutional issues should not and need not be reached. But the Ninth Circuit rejected all those threshold contentions. See J.S.App. A, pp. 4a–24a. In this Court, the INS jurisdictional statement (at pp. 6–7, n. 6) expresses total satisfaction with the Ninth Circuit's disposition of the threshold matters.

9. On the basic constitutional issue, the Ninth Circuit held that the Section 244(c)(2) procedures violate the separation of powers doctrine, as Chadha and the INS had argued. And in ordering the Attorney General to cancel Chadha's deportation order and to cease and desist from taking steps to deport Chadha based on the House resolution, the Ninth Circuit gave the very relief that both Chadha and the INS had

sought. Needless to say, the INS jurisdictional statement in this Court questions none of the constitutional rulings or rationale of the Ninth Circuit; nor does it question any part of the relief given by the Ninth Circuit.

10. In all respects, the decision of the Ninth Circuit established both the appellee Chadha and the appellant INS as the prevailing and winning parties. There were no losing parties, no aggrieved parties, before the court. Chadha, being totally satisfied with the decision, has not sought further review by this Court. The INS, although equally satisfied, has apparently taken an appeal in order to secure this Court's stamp of approval on the Ninth Circuit's ruling.

11. The only truly aggrieved entities are now the House of Representatives and the Senate. But in the proceedings leading to the Ninth Circuit decision, the House and Senate participated only as *amici*, not as adverse parties. Their intervention subsequent to the decision was not designed as a retroactive investiture of adverseness in parties or issues prior to the decision. Intervention was sought and granted solely to give the two Houses standing to protest the Ninth Circuit's ruling. That protest includes the objection that the absence of adverse parties before the Ninth Circuit drained the proceeding of an essential Article III "case or controversy" requirement.

ARGUMENT

1. AS A PREVAILING AND NON-AGGRIEVED PARTY, THE INS LACKS STANDING TO INVOKE APPEAL JURISDICTION PURSUANT TO SECTION 1252

This Court has no jurisdiction under Section 1252 to entertain an appeal by a non-aggrieved party from a decision of a court of appeals invalidating a federal

statute. Since the appellant INS is a prevailing party as to all aspects of the decision below, and asserts no grievance before this Court, its appeal should be dismissed.

The unarticulated premise of this attempt to invoke Section 1252 is the notion that, since Section 1252 literally permits "any party" to the proceeding below to take an appeal, the putative appellant need not be aggrieved. But that notion is contradicted by the long-established rule of federal appellate practice that "a party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980), and authorities there cited.

This aggrieved-party rule is not rendered inapplicable simply because a jurisdictional statute uses the term "any party." While there are no recorded precedents on point under Section 1252, the rule has consistently been applied by this Court to reject appeals sought by non-aggrieved parties pursuant to Section 1253. That section permits "any party" to appeal to this Court from three-judge court orders granting or denying injunctions.[2] Yet this Court has always insisted that the party invoking Section 1253 be aggrieved in some way by the decision below. See *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206 (1939) ("the successful party below has no standing to appeal from the decree denying the injunc-

[2] The term "any party" was inserted into what is now Section 1253 in the 1948 recodification of the Judicial Code. Previously, this jurisdictional provision had stated that "an appeal may be taken directly to the Supreme Court." See 36 Stat. 557 (1913); 43 Stat. 938 (1925); 50 Stat. 753 (1937). And see *Perez* v. *Ledesma*, 401 U.S. 82, 84 n. 1 (1971), where the Court, in summarizing Section 1253, referred to "an aggrieved party" being eligible to take an appeal thereunder.

tion"); *Gunn* v. *University Committee,* 399 U.S. 383, 390 n. 5 (1970) ("the appellants could not appeal from an order in their favor"); *Perez* v. *Ledesma,* 401 U.S. 82, 87 n. 3 (1971) ("a successful party . . . cannot appeal [under § 1253] from its victory").

The words "any party" also appear in the certiorari statute, Section 1254(1), which provides that cases in courts of appeals may be reviewed by writ of certiorari granted upon "the petition of any party to a civil or criminal case, before or after rendition of judgment or decree." Those words were added to the statute in 1911 not to permit certiorari to be sought by a party who prevailed in a court of appeals but merely to make clear something that had not previously been clear—that the United States, as a losing and aggrieved party in a criminal case in a court of appeals, could seek certiorari review by this Court. *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 545 (1925).

Certiorari has yet to be granted on the petition of "any party" who is totally satisfied with a court of appeals ruling.[3] Even the Solicitor General has doubted "whether a completely victorious party in the court of appeals may seek certiorari."[4] To permit that would violate the basic rule of appellate practice that precludes further appeals by successful parties below. The seeming applicability of that rule to Sec-

[3] The reference to "any party" in § 1254(1) has been given literal application in those rare but important instances where, the losing party in the district court having docketed an appeal in a court of appeals, the winning party in the district court then seeks certiorari before judgment of the court of appeals. See, *e.g.*, *United States* v. *Nixon,* 418 U.S. 683, 686–687 (1974).

[4] Memorandum for the United States in Opposition (p. 2) to petition for certiorari in *Data Products Corp.* v. *United States,* No. 74–854, certiorari dismissed, 420 U.S. 967 (1975), cited and discussed in R. Stern & E. Gressman, *Supreme Court Practice* 58–59 n.8 (5th ed. 1978).

tion 1254(1) would also preclude resort by the INS to the Section 2103 provision that if an appeal is improvidently taken from a decision by a federal court of appeals, the appeal papers shall be treated as a petition for certiorari. If a successful party cannot appeal, neither can he seek certiorari.

Nothing in *United States* v. *Lovett,* 328 U.S. 303, 306–307 (1946), cited in the INS jurisdictional statement (at 12–13, n. 9), suggests that a prevailing governmental party is entitled to file a petition for certiorari, let alone take an appeal. The *Lovett* case came to this Court from the Court of Claims, pursuant to a jurisdictional statute whereby only the United States or the claimant in that court can file a petition for certiorari.[5] The Solicitor General had supported the three claimants in the Court of Claims in their challenge to the constitutionality of an appropriation statute that forbade payment of compensation to the three government employee claimants; special counsel for the Congress appeared as *amici* in the Court of Claims to defend the constitutionality of the statute.

After the Court of Claims held the statute unconstitutional, the Solicitor General filed a petition for certiorari "because of the Government's belief that

[5] At the time of the *Lovett* case, the relevant jurisdictional statute was § 3(b) of the Act of Feb. 13, 1925, 43 Stat. 939 (as amended by the Act of May 22, 1939, 63 Stat. 753). Section 3(b) provided: "In any case in the Court of Claims . . . it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned . . ." In the 1948 recodification of the Judicial Code, 62 Stat. 928, this provision assumed its present form as 28 U.S.C. § 1255. Section 1255 reads in pertinent part: "Cases in the Court of Claims may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted on petition of the United States or the claimant; . . ."

important constitutional issues are involved and because *amici curiae,* representing the Congress, having no access to this Court, requested that a petition for writs of certiorari be filed." Brief of the United States, p. 2. No one questioned or protested the Solicitor General's filing in terms of the Government's non-aggrieved status. And the filing was largely an accommodation for the Congressional *amici* who had no other "access to this Court." In any event, the Court's opinion in *Lovett* did not discuss or resolve the jurisdictional propriety of the filing. Its precedential value is limited to the highly unusual facts and circumstances there present.

A fair conclusion is that the aggrieved-party rule of appellate practice has been superimposed on all jurisdictional statutes, including Section 1252, that authorize "any party" to seek review in this Court. The INS jurisdictional statement does not address, let alone refute, this aggrieved-party requirement.[6] Instead, it submerges into a footnote (n. 9 at 12–13) two counterproductive contentions relative to compliance with Section 1252:

(1) The belief is expressed that INS may appeal under Section 1252, despite its position on the constitutionality of Section 244(c)(2), since the Ninth Circuit rendered judgment "against the INS" and ordered the Attorney General "to cease and desist from taking any steps to deport appellee Chadha." But that was precisely the judgment and order that the INS, along with Chadha, fought to secure. And that is

[6] In the "Jurisdiction" section of the jurisdictional statement (at 2), citation is made to *Parker* v. *Levy*, 417 U.S. 733, 742–743 n. 10 (1974), the only prior instance of a Section 1252 appeal from a court of appeals ruling invalidating a statute. But the governmental appellants in that case were truly aggrieved by the appellate court's invalidation of certain Articles of the Uniform Code of Military Justice.

precisely the judgment and order that INS would have this Court affirm.

(2) The INS also claims that its appeal serves the purpose of Section 1252, which is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." *McLucas* vs. *DeChamplain,* 421 U.S. 21, 31 (1975). But that purpose is not advanced or even served when the governmental parties abandon any defense of an Act of Congress and prevail in their attack upon the validity of the statute.

Clearly, it is the "holding of unconstitutionality" that triggers a Section 1252 appeal. And it is the "holding of unconstitutionality" that must create an appealable grievance on the part of the losing party. In the normal situation, given the Executive duty to defend Congressional statutes, the United States or an officer thereof will be the prime losing party. But this is not a normal case.

What we have here is a historically unique situation not contemplated by the language or purpose of Section 1252. By attacking rather than defending the constitutionality of Section 244(c)(2) of the Immigration and Nationality Act, the INS lacks any grievance stemming from the "holding of unconstitutionality." The INS thus needs no quick access to this Court, the quick access that Section 1252 was designed to provide.

To insist that a Section 1252 appellant be a party aggrieved by the holding of unconstitutionality is to serve the real purpose of this jurisdictional statute. So far as the words "any party" are concerned, they draw meaningful content from the fact that more than one party may be aggrieved by such a holding. Thus when the Government intervenes in a private action in which the constitutionality of an Act of Congress is

drawn in question, see 28 U.S.C. § 2403(a), at least one of the private litigants is apt to be aligned with the Government in defense of the constitutionality of the statute. In that event, both the Government and the private litigant could appeal under Section 1252 from an adverse ruling. See, for example, *United States* v. *Bekins*, 304 U.S. 27 (1938).

In sum, the INS as a prevailing and non-aggrieved party has no standing to appeal under Section 1252.[7]

2. THIS COURT HAS NO JURISDICTION OVER AN APPEAL FROM A HOLDING OF UNCONSTITUTIONALITY WHERE THE PARTIES BELOW WERE IN TOTAL AGREEMENT AS TO THE UNCONSTITUTIONALITY OF AN ACT OF CONGRESS

The jurisdictional defect in the INS appeal runs deeper than the absence of any grievance that would entitle the INS to invoke Section 1252. The root of the defect is in the fact that both parties to the litigation lacked any adverseness between them on any issue at stake in the Ninth Circuit review proceedings. Both were in total agreement in urging (a) the unconstitutionality of Section 244(c)(2), and (b) the cancellation of the INS order that Chadha be deported.

From every standpoint, the review proceedings were devoid of what *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), described as "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." There literally was no case

[7] Section 1252 has twice been marked for extinction. The proposed Supreme Court Jurisdiction Acts of 1978 and 1979 (S. 3100, 95th Cong., 2d Sess., and S. 450, 96th Cong., 1st Sess.) would have excised Section 1252 as unnecessary. See S. Rep. No. 95-985; S. Rep. No. 96-35; Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A.J. 1325, 1326 (1979); Note, *Section 1252: A Jurisdictional Dinosaur*, 75 Nw.L. Rev. 175 (1980).

or controversy between Chadha and the INS respecting the constitutionality of Section 244(c)(2) or the relief to be had upon a holding of unconstitutionality. Both agreed that Congress, in enacting Section 244 (c)(2), had intruded not upon any rights or privileges of Chadha but upon the powers thought to be constitutionally and exclusively vested in the Executive Branch of the Government. The real controversy, in short, was between the Executive Branch and the Legislative Branch, which is what the separation of powers doctrine is all about.

Once it became clear that Chadha was limiting his complaint about the deportation order to an assertion that Congress had invaded the powers and functions of the Executive Branch, the INS as an Executive Branch agency had no difficulty in joining Chadha in such a constitutional assault upon the powers of Congress. The difficulty is that such complete agreement between the parties as to the sole issue in the proceedings, particularly an issue of constitutional dimensions, deprives the proceedings of the adverseness so essential to an Article III "case of controversy."

This appeal must suffer the fate of the appeal brought here in *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 47–48 (1971):

> At the hearing both parties argued to the three-judge court that the anti-busing law was constitutional and urged that the order of the District Court adopting the Finger plan should be set aside. We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution. *Muskrat* v. *United States*, 219 U.S. 436 (1911).... *Dismissed.*

To paraphrase the *Moore* holding, we are here confronted with the anomaly that both litigants (Chadha and the INS) desire precisely the same result, namely a holding that Section 244(c)(2) of the Immigration and Nationality Act is unconstitutional. The proceedings here are no more of a case or controversy than the proceedings in *Moore*.

It is no answer to this Article III problem that the House of Representatives and the Senate participated in the Ninth Circuit proceedings as *amici curiae*. Their adversary presentation of the constitutional issues was done in the capacity of friends of the court, not as litigating parties. The requisite adverseness must be as between parties to the proceedings, not between the parties and the *amici*.

Nor can it be said that intervention by the House and Senate, following the Ninth Circuit's holding of unconstitutionality, retroactively invested the prior proceedings with the necessary adverseness. The intervention was sought and obtained solely to have standing to object in this Court to such matters as the lack of adverseness between the parties supposedly in litigation before the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the appeal docketed by the INS should be dismissed. All the questions arising out of the Ninth Circuit's opinion, including the question put in the INS jurisdictional statement, are presented in the two petitions for certiorari filed herewith by the House of Representatives and the Senate.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

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No. 80-1832

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE APPELLANT

1.a. The United States Senate and House of Representatives contend in their motions to dismiss the appeal that this Court is without jurisdiction under 28 U.S.C. 1252 to entertain the appeal. This contention is incorrect. Section 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

The court of appeals is a "court of the United States" for purposes of this statute, *Parker* v. *Levy*, 417 U.S. 733, 742 n.10 (1974), and the proceedings below clearly constituted a

"civil action, suit, or proceeding" to which an agency of the United States—the Immigration and Naturalization Service—was a party. Furthermore, the court of appeals squarely held the "one-House veto" provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), unconstitutional. The only express requisites for an appeal to this Court under 28 U.S.C. 1252 therefore have been met, and the House and Senate do not contend otherwise. In these circumstances, Section 1252 authorizes "[a]ny party" to take an appeal to this Court from the judgment, decree, or order holding the Act of Congress unconstitutional. See *Williams* v. *Zbaraz*, 448 U.S. 358, 366-367 (1980).

The House and Senate argue, however, that 28 U.S.C. 1252 cannot be interpreted to permit INS to take an appeal in this case because, having argued below that the "one-House veto" provision in Section 244(c)(2) is unconstitutional, INS is not "aggrieved" by the decision of the court of appeals. House Motion 7-9; Senate Motion 2-3. This contention is in error, principally because it fails to distinguish between INS's position as a part of the Executive Branch, with a duty to enforce the laws passed by Congress, and its position as a litigant in this lawsuit, entitled (as any other litigant) to express its views on the constitutionality of those laws.

When the House of Representatives adopted the resolution disapproving the suspension of appellee Chadha's deportation, both the immigration judge and the Board of Immigration Appeals concluded that they had no authority to rule on the constitutional issue, and they therefore considered themselves bound by the mandate of Section 244(c)(2) to order Chadha deported. J.S. App. 71a, 73a. However, when Chadha petitioned for review of the deportation order in the court of appeals, INS presented its views on the constitutional question to the court. The court of appeals

was entitled to receive the views of the Executive Branch on this fundamental issue of separation of powers, and INS was obliged to express them. But, INS's presentation of the Executive's view on the constitutional issue did not have any effect on the outstanding order of deportation entered by the immigration judge. The decision of the court of appeals effectively sets aside the order of deportation, deems the immigration judge's initial order suspending deportation final, and orders the Attorney General to "cease and desist from taking any steps to deport [appellee Chadha] based upon the resolution adopted by the House of Representatives." J.S. App. 63a. INS therefore is an "aggrieved party" within the common sense meaning of the term: it is subject to an order of the court below prohibiting it from taking action that it otherwise would take and that it theretofore had initiated.

The cases upon which the House and Senate rely that involved direct appeal to this Court all concerned 28 U.S.C. 1253 or one of its predecessors, Section 266 of the Judicial Code (28 U.S.C. (1928 ed.) 380). Section 1253, like its predecessors, provides for direct appeal to this Court from an order granting or denying an injunction in a case required to be heard and determined by a district court of three judges. In *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206 (1939), the Court held that the defendant could not take a direct appeal to this Court under Section 266 of the Judicial Code from a final decree *denying* the plaintiff's request for injunctive relief against the defendant. Accord, *Gunn* v. *University Committee*, 399 U.S. 383, 390 n.5 (1970); *id.* at 391 (White, J., concurring). In the present case, in contrast, judgment was rendered *against* INS, and the Attorney General was ordered to cease and desist from taking any steps to deport Chadha. J.S. App. 63a. This appeal therefore is brought by a "defendant"—respondent INS, as the Attorney General's agent—against

whom injunctive relief was *granted*. Similarly, in *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151 (1934), and *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934), the Court dismissed a direct appeal brought under Section 266 of the Judicial Code by the plaintiff *in whose favor* the district court had granted injunctive relief.[1] Although these cases lend support to an argument that appellee Chadha could not take a direct appeal from the judgment below,[2] they do not suggest that a defendant *against whom* injunctive relief is entered—here, INS—may not take a direct appeal to this Court.[3]

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[1] *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U.S. 376, 377-378 (1903), cited by the Senate (Motion 2 n. 1), falls in the same category.

[2] Thus, contrary to the suggestion by the House (Motion 7), INS's right to bring the instant appeal does not depend on a literal and all-encompassing reading of the language in 28 U.S.C. 1252 providing that "[a]ny party" may take an appeal under that section from a decision holding an Act of Congress unconstitutional. INS does not stand in the position of "any party." It is the party whose order of deportation was nullified by the court of appeals and the party that was ordered (as the agent of the Attorney General) to "cease and desist" from taking any steps to deport Chadha. J.S. App. 63a.

[3] For the same reason, the statement in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 333 (1980), that "[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it," has no application here. *Roper* involved a situation in which the named *plaintiff* in a class action had been awarded all the relief he had sought on the merits. In contrast, the judgment below is not one "affording * * * relief" to INS. *Roper* is inapposite for a number of other reasons as well. The appeal in that case was taken to the court of appeals pursuant to 28 U.S.C. 1291, not to this Court pursuant to 28 U.S.C. 1252, and the case involved a question of mootness, not an interpretation of the statute conferring appellate jurisdiction. Moreover, the Court observed that a party who receives all that he has sought *generally* is not aggrieved by the judgment and cannot appeal from it. Whatever may be the general rule under other statutes, in enacting 28 U.S.C. 1252, Congress has determined that an agency that is a party to a case in which an Act of Congress has been held unconstitutional is "aggrieved" for purposes of taking an appeal from that holding.

b. *United States* v. *Lovett*, 328 U.S. 303 (1946), directly supports INS's right to seek review in this Court. In that case, Congress had enacted a rider to an appropriations bill barring the use of appropriated funds to pay the salaries of certain named Executive Branch employees. The employees brought an action against the United States in the Court of Claims, contending that they were entitled to recover because the statute was unconstitutional. Because the United States agreed with the plaintiffs concerning the validity of the statute, special counsel for Congress appeared as amicus curiae to defend the constitutionality of the appropriations act. After the Court of Claims held the statute unconstitutional, the United States—which had argued that the statute was invalid—petitioned for a writ of certiorari. The Court granted the petition and affirmed the judgment, after hearing argument by counsel for Congress in support of the statute.

The House and Senate suggest that the United States petitioned for certiorari in *Lovett* in order to obtain review for the amicus curiae representing Congress, which could not petition in its own right (House Motion 9-10; Senate Motion 4-5). This may partially explain the Solicitor General's motivation for seeking review of a judgment that the United States supported, although the Brief for the United States states that the United States also sought review because "important constitutional issues are involved which should be resolved by this Court." Brief for Petitioner, Nos. 809-811, 1945 Term, at 2. But whatever the Solicitor General's *reasons* for seeking certiorari may have been, those reasons—including Congress' request—could not alone furnish this Court with *jurisdiction* to entertain the petition. Accordingly, the Solicitor General also was careful to stress that review was being sought by "[t]he United States, *against which judgments were rendered in the court below.*" *Ibid.* (emphasis added). See also *United States* v. *Smith*, 286 U.S. 6 (1932). Thus, at least in cases

involving the constitutionality of an Act of Congress, *Lovett* establishes that a judgment against the United States furnishes a sufficient basis on which the government may seek review in this Court, even though the Executive may have argued against the constitutionality of the statute in the court below.

It must be recalled as well that in *Lovett*, as in the instant case, the Executive argued against the constitutionality of a statute that was believed to infringe upon the prerogatives of the Executive Branch under our system of separation of powers. Especially in this unique context, a proper respect for a law duly enacted by a coordinate branch provides sufficient basis for the Executive to seek and this Court to grant review, even though the Executive cannot argue in support of the constitutionality of the law.[4] The Court may then hear argument in support of the statute's constitutionality—presumably by Congress, appearing either as amicus curiae, as in *Lovett*, or as a party. Such an approach ensures that whatever arguments legitimately may be advanced in support of the constitutionality of an Act of Congress will not be foreclosed in this Court merely because the Executive (which cannot endorse those arguments) was responsible for the conduct of the litigation in the lower courts.[5] See also *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968); page 14, *infra*.

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[4]Thus, an appeal by the Executive would lie in such circumstances even if the *present* Congress did not wish to defend the constitutionality of the statute in this Court. Cf., *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[5]Contrary to the implicit suggestion of the Senate (Motion 6), the fact that the House and Senate intervened after judgment in the court of appeals and have filed petitions for a writ of certiorari to review the judgment below (Nos. 80-2170 & 80-2171) does not indicate that INS may not bring this appeal. When, on January 19, 1981, INS filed its notice of appeal from the December 22, 1980 decision of the court of appeals (J.S. App. 74a), the House and Senate had not even moved to intervene in the case. Thereafter, the House and Senate did move to

c. The right—perhaps even the duty—of INS to bring this appeal is confirmed by the language and purposes of 28 U.S.C. 1252. In enacting that Section, Congress plainly deemed an agency of the United States that is a party to a case in which an Act of Congress it administers is held unconstitutional to be aggrieved by that holding for purposes of taking an appeal.

Section 1252 grants a right of direct appeal to this Court *only* in a case in which the "United States or any of its agencies, or any officer or employee thereof * * * is a party." In other cases in which an Act of Congress is held unconstitutional, an appeal from a decision of the district court must be taken to the court of appeals pursuant to 28 U.S.C. 1291, and review in this Court is available only by writ of certiorari. See 28 U.S.C. 1254(1). This underscores the special status Congress conferred on the government as a party in such a case.

As this Court has stated, the purpose of Section 1252 is "to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus

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intervene. Their motions were granted, but their petition for rehearing in the court of appeals was denied on March 25, 1981. *Id.* at 75a-76a. INS filed a second notice of appeal on April 16, 1981, within 30 days after the rehearing petition was denied, and docketed the appeal on May 1, 1981. *Id.* at 77a-78a; see 28 U.S.C. 2101(a). At that point, of course, there could be no assurance that the House and Senate would seek review to support the constitutionality of the statute. When the House and Senate did seek review almost two months later, they did not similarly invoke this Court's obligatory jurisdiction by bringing an appeal pursuant to 28 U.S.C. 1252 in their own right; they instead filed petitions for a writ of certiorari. The Court's obligatory jurisdiction over INS's perfected appeal was not somehow divested when the House and Senate *subsequently* filed certiorari petitions seeking discretionary review. In any event, the result would be the same even if the House and Senate had sought review by taking an appeal and had done so before the instant appeal was docketed, because one party's right of review is not dependent on the failure of another party to seek review.

will be bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U.S. 21, 31 (1975). Because, in these circumstances, the Executive will be required to conform its conduct to the judicial decision and therefore to disregard the contrary provisions of an Act of Congress, Congress determined in enacting 28 U.S.C. 1252 that a due regard for the role of the Legislative Branch under our system of separation of powers requires that this Court should review a decision that has such an effect.[6]

Congress' purpose of ensuring mandatory review by this Court of decisions holding Acts of Congress unconstitutional where the Executive will be bound by the result applies without regard to whether the Executive itself supports the constitutionality of the statute. Thus, 28 U.S.C. 1252 must be read to authorize the Executive, which represents the federal government in litigation, to take a direct appeal from a decision holding an Act of Congress unconstitutional whenever plausible arguments may be made in support of the constitutionality of the statute,[7] even if the Executive cannot make those arguments itself because they are contrary to the constitutional independence of the Executive Branch. This interpretation allows the statute in

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[6]This congressional judgment is also reflected in 2 U.S.C. (Supp. III) 288k(b), which requires the Attorney General to notify the Senate Legal Counsel of any determination by the Solicitor General not to appeal any judicial decision affecting the constitutionality of an Act of Congress within such time as will enable the Senate to direct the Counsel to intervene in the case.

[7]This Department in the past has declined to take an appeal from a decision holding an Act of Congress unconstitutional if arguments in support of the statute are foreclosed by prior decisions of this Court or would otherwise be wholly without merit, even where the statute has no particular impact on the prerogatives of the Executive Branch. This practice is consistent with the role of attorneys for the government as officers of this Court not to advance meritless arguments. See ABA Code of Professional Responsibility, DR 7-102(A)(2) (1969).

question to be defended before the highest Court by others who are not so restrained, thereby furthering the purposes of Section 1252. As the House Committee on the Judiciary stated in proposing the provision that is now Section 1252, "[t]he importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment." H.R. Rep. No. 212, 75th Cong., 1st Sess. 2 (1937).

Moreover, when an Act of Congress is declared unconstitutional by a lower federal court in a case in which an agency of the United States is a party, a cloud is cast over the validity of the Act in the Nation as a whole (see, *e.g.*, 81 Cong. Rec. 3268-3269 (1937) (remarks of Rep. Sumners)), and the Executive may be forced to take inconsistent positions in other judicial districts or circuits in the administration of the statute. Thus, Congress enacted 28 U.S.C. 1252 to ensure that a definitive resolution of the constitutionality of an Act of Congress is obtained *promptly* whenever a lower federal court has declared the Act unconstitutional. Only this Court can provide such a definitive resolution. See *McLucas* v. *DeChamplain, supra; Fleming* v. *Rhodes*, 331 U.S. 100, 104 & n.6 (1947); *Reid* v. *Covert*, 351 U.S. 487, 490 (1956), vacated on other grounds, 354 U.S. 1 (1957).

In the present case, if INS did not take an appeal from the court of appeals' decision, that decision would be binding precedent only in the Ninth Circuit. In cases arising in other circuits, immigration judges would continue to order deportation of any alien whose suspension of deportation had been disapproved by one House of Congress pursuant to Section 244(c)(2), and INS would deport the alien unless the deportation order was overturned by the court of appeals for that circuit on the alien's petition for review. This state of affairs would allow uncertainty about the constitutionality of the administrative program to persist

for an extended period and could lead to disparate treatment of similarly situated aliens. INS's appeal in the instant case therefore significantly furthers the statutory purpose of ensuring an expeditious decision by this Court.

Nothing in the legislative history of 28 U.S.C. 1252 suggests that an agency of the United States should be barred from taking a direct appeal in circumstances such as these, even though such an appeal would directly further the congressional purposes in enacting Section 1252. To the contrary, the Conference Report, in describing the Senate version of the bill that was eventually enacted, states without qualification that it "provide[s] for a direct appeal by the United States to the Supreme Court where the decision is against the constitutionality of any act." H.R. Conf. Rep. No. 1490, 75th Cong., 1st Sess. 5 (1937). See also H.R. Rep. No. 212, *supra*, at 2 ("It is provided by the committee amendment to this bill that the Attorney General in his discretion may appeal directly to the Supreme Court from *any* decision or order of a lower court which is adverse to the constitutionality of an act of congress * * *") (emphasis added); S. Rep. No. 963, 75th Cong., 1st Sess. 4 (1937) (where the decision is "against the constitutionality of any act of Congress, the *United States* or any other party to such suit or proceeding may appeal directly to the Supreme Court * * *") (emphasis added).[8]

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[8]The possibility that the Attorney General would not defend the constitutionality of a federal statute where intervention was authorized under what is now 28 U.S.C. 2403 was mentioned several times during the House debates on the bill that contained both that provision and the provision now codified at 28 U.S.C. 1252. 81 Cong. Rec. 3266 (1937) (remarks of Rep. O'Connor); *id.* at 3268 (remarks of Reps. Cox and Michener). If Congress had intended to bar a direct appeal by the Attorney General in these circumstances, it presumably would have limited the otherwise unqualified language of Section 1252 that provides for direct appeal.

2. The House of Representatives also argues (Motion 12-14) that this Court lacks jurisdiction over the appeal because there was a lack of "adverseness" between INS and appellee Chadha in the court of appeals. The Senate, in its Motion to Dismiss, does not join the House in this argument. Contrary to the House's suggestion, however, even if the court of appeals were without jurisdiction over the case because of the absence of a case or controversy for Article III purposes, that would not deprive this Court of statutory jurisdiction over the appeal under 28 U.S.C. 1252. *Williams* v. *Zbaraz, supra*, 448 U.S. at 366-368. If the Court considers this case on the basis of INS's appeal, the House will remain free to present its arguments regarding the absence of a case or controversy (*ibid.*) in the same manner as if the Court granted the House's petition for a writ of certiorari raising the same issue. See 80-2170 Pet. I, 23.[9]

In any event, the House's contention that there was no Article III case or controversy in the court of appeals is without merit. INS, after following its established adjudicatory procedures, issued an order requiring Chadha's deportation. If Chadha had not petitioned for review of this order, he would have been subject to deportation, even

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[9] *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47 (1971), relied upon by the House (Motion 13), is readily distinguishable in this respect. There the Court concluded that it did not have *statutory* jurisdiction over the appeal under 28 U.S.C. 1253 because neither party sought an injunction prohibiting enforcement of a state statute alleged to be unconstitutional. No such difficulty is present here. The Court also concluded, after briefing and argument, that there was no case or controversy within the meaning of Article III of the Constitution. But unlike in *Moore*, there could be no suggestion in the present case that the proceedings below constituted a feigned suit (cf. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts And the Federal System* 104 (2d ed. 1973)) or that the constitutional issue was presented as a hypothetical or abstract question (cf. *Muskrat* v. *United States*, 219 U.S. 346 (1911)). See pages 11-14, *infra*.

though the Executive believed the "one-House veto" provision that led to the deportation order to be unconstitutional. Thus, as the court of appeals recognized (J.S. App. 22a-23a), Chadha asserted a "concrete controversy" as to whether he would be deported. The petition for review therefore presented a controversy "admitting of specific relief through a decree of a conclusive character" (*Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 241 (1937)), for the court of appeals cancelled the deportation order and directed the Attorney General to cease and desist from taking any steps to carry it out.

This conclusion is not altered by the fact that INS argued in the court of appeals against the constitutionality of Section 244(c)(2). Until and unless the court of appeals entered a decision holding the statute unconstitutional, INS intended to enforce the law by subjecting Chadha to deportation. *In re Metropolitan Ry. Receivership*, 208 U.S. 90, 107-108 (1908);[10] see also *Pope* v. *United States*, 323 U.S. 1, 11-12

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[10]The Court's observation in *In re Metropolitan Ry.* (208 U.S. at 107-108) regarding statutory jurisdiction is equally applicable in the present setting:

> We think that where there is a justiciable claim of some right * * * which claim is not satisfied by the party against whom it is made, there is a controversy, or dispute, between the parties within the meaning of the statute. It is not necessary that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it. It might be that he could not truthfully dispute it, and yet, if from inability, or mayhap, from indisposition, he fails to satisfy it, it cannot be that because the claim is not controverted the Federal court has no jurisdiction of an action brought to enforce it. Jurisdiction does not depend upon the fact that the defendant denies the existence of the claim made, or its amount or validity. If it were otherwise, then the Circuit Court would have no jurisdiction if the defendant simply admitted his liability and the amount thereof as claimed, although not paying or satisfying the debt. This would involve the contention that the Federal court might be without jurisdiction in many cases where, upon bill filed, it was taken *pro confesso*, or whenever a judgment

(1944); *Kentucky* v. *Indiana*, 281 U.S. 163, 175-176 (1930). As the Ninth Circuit noted, this Court has recognized the presence of a justiciable case or controversy irrespective of a party's concessions on a legal issue in the case. See, *e.g.*, *Young* v. *United States*, 315 U.S. 257, 258-259 (1942); *Sibron* v. *New York*, 392 U.S. 40, 58 (1968). And, of course, in the present case, a full presentation of opposing views on the legal issues was ensured in any event by the appearance of the House and Senate as amici curiae in support of the constitutionality of Section 244(c)(2). This adverseness will continue in this Court, because the House and Senate are now parties to the case.

This is precisely the manner in which *United States* v. *Lovett* was litigated in the Court of Claims and in this Court. See also *Cheng Fan Kwok* v. *INS*, *supra*, 392 U.S. at 210 n.9; *United States* v. *Smith*, *supra*, 286 U.S. at 30; *Atkins* v. *United States*, 556 F. 2d 1028, 1058 & n.15 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). This Court perceived no Article III problem in these circumstances, even though the fourth question presented by the United States' certiorari petition in *Lovett*, included at the request of congressional counsel, was "[w]hether the Court of Claims was presented with justiciable controversies." Senate Motion 5 n.6, quoting Petition for Certiorari, Nos. 809-811, 1945 Term, at 2.

Finally, as the court of appeals recognized, to accept the House's argument would be "implicitly [to] approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional.

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was entered by default. These are propositions which, it seems to us, need only to be stated to be condemned. The cases are numerous in which judgments have been entered by consent or default where the other requisites to the jurisdiction of the Federal court existed.

Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds." J.S. App. 23a-24a. Indeed, "[w]ere this case to be not justiciable," congressional action requiring Chadha's deportation from the United States "could never be challenged in any court." *United States* v. *Lovett, supra*, 328 U.S. at 314. See also note 10, *supra*.

The only other alternative available to the Attorney General, in view of the Executive's position that the "one-House veto" provision in Section 244(c)(2) is unconstitutional, would be to ignore a resolution of disapproval passed by one House of Congress and to cancel deportation proceedings and confer permanent resident statuts on the alien. This approach, which would not be subject to judicial review, would be inconsistent with the accepted view that constitutional questions arising in the administration of a statute should, if possible, be resolved by the courts, not by the administrative agency itself. See, *e.g., Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). Because the constitutional question in this case involves a conflict between the Executive and Legislative Branches, it is particularly important that it be resolved by the Judicial Branch. Accordingly, the course that the INS chose to follow—to enforce the statute, in order to ensure a judicial resolution of the controversy, but to refuse to defend the statute once judicial proceedings were initiated—was not merely permissible under the circumstances, but was a responsible and wholly appropriate response to the situation presented by the House resolution requiring appellee Chadha's deportation.

For the foregoing reasons and the additional reasons set forth in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

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Nos. 80-1832, 80-2170 and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT
v.
JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER
v.
IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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QUESTIONS PRESENTED

1. Whether the provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254 (c)(2), authorizing one House of Congress to adopt a resolution invalidating an order of the Attorney General suspending the deportation of an alien and requiring the deportation of the alien is unconstitutional because it contravenes the procedures established in Article I of the Constitution for the exercise of legislative power or because it violates the principle of separation of powers.

2. Whether the provision in Section 244(c)(2) authorizing one House of Congress to pass such a resolution is severable from the remainder of Section 244.

3. Whether the court of appeals had jurisdiction of this case under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a).

4. Whether the House of Representatives' and Senate's other jurisdictional and related arguments for avoiding a decision on the merits are correct.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1832

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

No. 80-2170

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

No. 80-2171

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-63a) is reported at 634 F.2d 408. The decisions of the immigration judge (J.S. App. 64a-66a, 70a-71a; J.A. 46-48, 52-54) and the opinion of the Board of Immigration Appeals (J.S. App. 72a-73a; J.A. 55-56) are not reported.

JURISDICTION

The judgment of the court of appeals (80-2171 Pet. App. 84a) was entered on December 22, 1980, and the Immigration and Naturalization Service (INS) filed a notice of appeal in No. 80-1832 (J.S. App. 74a) on January 19, 1981. On March 13, 1981, Justice Rehnquist extended the time for docketing the appeal to and including May 1, 1981. The motions of the United States House of Representatives and the United States Senate to intervene were granted on March 10, 1981 (J.S. App. 75a), and their petition for rehearing was denied on March 25, 1981 (J.S. App. 76a). On April 16, 1981, the INS filed a second notice of appeal in No. 80-1832 (J.S. App. 77a-78a). See J.S. 2 n.1; Sup. Ct. R. 11.3. The jurisdictional statement in No. 80-1832 was filed on May 1, 1981, and the petitions for a writ of certiorari in Nos. 80-2170 and 80-2171 were filed on June 22, 1981. On October 5, 1981, this Court postponed the question of jurisdiction in No. 80-1832 to the hearing on the merits and granted the petitions for a writ of certiorari in Nos. 80-2170 and 80-2171. The jurisdiction of this Court in No. 80-1832 is invoked under 28 U.S.C. 1252, and in Nos. 80-2170 and 80-2171 under 28 U.S.C. 1254(1).[1]

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[1] We have fully addressed the question of this Court's jurisdiction under 28 U.S.C. 1252 in the reply brief for INS (at 1-10) filed in response to the motions of the Senate and House of Representatives to dismiss the appeal in No. 80-1832. Because the Court has granted the Senate and House of Representatives' certiorari petitions in Nos. 80-2170 and 80-2171 to review the same judgment, the issue of this Court's jurisdiction of INS's appeal under 28 U.S.C. 1252 is no longer of significance in this case.

This jurisdictional issue would be relevant only if, contrary to our contention (see pages 65-72 *infra*) and the holding below (J.S. App. 4a-11a), the Court were to conclude that the court of appeals did not have statutory jurisdiction of the case under 8 U.S.C. 1105a(a). In that event, the Court could not consider the merits of the case on the Senate and House of Representatives' certiorari petitions, because the case would not have been properly "in" the court of appeals for purposes of 28 U.S.C. 1254(1). See

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Articles I and II of the United States Constitution and Sections 106, 244 and 406 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1105a, 1254 and 1101 note, are set forth as an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

1. Section 244(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a)(1), authorizes the Attorney General, in his discretion, to suspend the deportation of certain aliens who are otherwise deportable and to adjust their status to that of aliens lawfully admitted for permanent residence. In order to be eligible for this relief, an alien must be deportable under any law of the United States (except certain provisions not here applicable), must have been physically present in the United States for a continuous period of not less than seven years, must prove that during all of such period he has been a person of good moral character, and must be "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien" or to the alien's spouse, parent, or child who is a citizen or permanent resident alien of the United States. See *INS* v. *Wang*, 450 U.S. 139 (1981).

United States v. *Nixon*, 418 U.S. 683, 690-692 (1974). But no such limitation is contained in 28 U.S.C. 1252. Because one of the principal purposes of Section 1252 is to resolve doubts about the constitutionality of an Act of Congress, the jurisdiction of this Court under that Section to decide the merits of the constitutional issue does not depend on the jurisdiction of the lower federal court that first held the Act unconstitutional. *McLucas* v. *DeChamplain*, 421 U.S. 21, 32 (1975); *Williams* v. *Zbaraz*, 448 U.S. 358, 367-368 & n.10 (1980); cf. *Donovan* v. *Richland County Association for Retarded Citizens*, No. 81-255 (Jan. 11, 1982), slip op. 2-3 n.3. Because of the contingent nature of the possible relevance of the jurisdictional issue under 28 U.S.C. 1252, and because we are content in any event to rest upon the arguments previously made on that issue in the reply brief, we will not burden the Court with a rehearsing of those arguments here.

Section 244(c)(1) of the Act, 8 U.S.C. 1254(c)(1), provides that "[u]pon application by any alien who is found by the Attorney General to meet the requirements of subsection (a) * * * the Attorney General may in his discretion suspend deportation of such alien." If the alien's deportation is suspended, "a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension" (*ibid.*). Section 244(c)(2) then provides that if, during the session of Congress in which the case is reported or the succeeding session, "either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law." However, if neither the Senate nor the House of Representatives passes a resolution of disapproval during the period provided, "the Attorney General shall cancel deportation proceedings" pertaining to the alien. *Ibid.* Section 244(d) in turn provides that, upon the cancellation of deportation, the Attorney General shall record the alien's lawful admission for permanent residence as of the date of cancellation. 8 U.S.C. 1254(d).

2.a. Appellee-respondent Chadha, who is a citizen of the United Kingdom, a native of Kenya, and of East Indian extraction (J.A. 8, 13, 20), was lawfully admitted to the United States in 1966 on a nonimmigrant student visa (J.A. 6, 22). His visa expired on June 30, 1972. On October 11, 1973, the District Director of the Immigration and Naturalization Service (INS) issued to Chadha an order to show cause why he should not be deported (J.A. 6). On January 11, 1974, a deportation hearing was commenced pursuant to Section 242 of the Act, 8 U.S.C. 1252, before an immigration judge (J.A. 7). Chadha conceded that he was deportable for overstaying his visa (J.A. 10), and the hearing was ad-

journed so that he could file an application for suspension of deportation (J.A. 21, 23). See J.S. App. 2a.

After Chadha submitted his application for suspension of deportation (J.A. 33-36), the deportation hearing was resumed on February 7, 1974 (J.A. 23). On the basis of evidence adduced at the hearing (J.A. 23-32), affidavits submitted with the application (J.A. 37-45), and the results of a character investigation conducted by the INS (J.A. 31), the immigration judge, on June 25, 1974, ordered that Chadha's deportation be suspended (J.S. App. 64a-66a; J.A. 46-48). The judge found that Chadha had resided continuously in the country for seven years, was of good moral character, and would suffer "extreme hardship" if deported. The finding of extreme hardship was based principally on the fact that "it would be extremely difficult, if not impossible, for him to return to Kenya or go to Great Britain by reason of his racial derivation" (J.S. App. 66a; J.A. 47-48).

b. Pursuant to Section 244(c)(1) of the Act, a report of the suspension of Chadha's deportation was transmitted to Congress (J.S. App. 69a). On December 12, 1975, approximately a year and a half after the immigration judge suspended Chadha's deportation, Representative Eilberg introduced a resolution (H.R. Res. 926, 94th Cong., 1st Sess.; see J.S. App. 69a) stating that "the House of Representatives does not approve the granting of permanent residence in the United States" to Chadha and five other aliens. 121 Cong. Rec. 40247 (1975). On December 16, 1975, the resolution was discharged from further consideration by the House Judiciary Committee. 121 Cong. Rec. 40800; J.S. App. 67a-68a. Although Representative Wylie observed that "[t]his resolution has not been available to the Members of the House for review because it was not printed" (121 Cong. Rec. 40800 (1975); J.S. App. 67a), Representative Eilberg emphasized that the disapproval resolution had to be passed during that session of Congress, which was about to end,[2] or the aliens

[2] The First Session of the 94th Congress (the session following that during which the suspension of Chadha's deportation was

named in the resolution would be granted permanent resident status (121 Cong. Rec. 40800 (1975); J.S. App. 68a). In support of the resolution, Representative Eilberg stated: "[i]t was the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet [the] statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended" (*ibid.*). The House passed the resolution without further debate or recorded vote (J.S. App. 69a). The resolution of disapproval was not passed by the Senate or presented to the President for his approval or disapproval.

c. Following the House of Representatives' passage of the resolution, the immigration judge reopened the deportation proceedings (J.S. App. 70a-71a; J.A. 49, 53). At the reconvened hearing, Chadha moved that the deportation proceedings be terminated on the ground that the one-House veto provision in Section 244(c)(2) is unconstitutional, but the immigration judge concluded that he had no authority to rule on the validity of an Act of Congress (J.A. 49, 53; J.S. App. 71a). Accordingly, on November 8, 1976, the judge ordered Chadha deported to the United Kingdom (J.S. App. 70a-71a; J.A. 52-54).

On appeal to the Board of Immigration Appeals, Chadha again contended that Section 244(c)(2) of the Act is unconstitutional and that the deportation proceedings from which his appeal was taken therefore should have been terminated (J.A. 52-54). The Board rejected this contention and dismissed the appeal, similarly concluding that it had no power to declare a federal statute unconstitutional (J.S. App. 73a; J.A. 55-56).

3. On March 24, 1977, Chadha filed a petition for review of the deportation order in the United States Court of Appeals for the Ninth Circuit (J.A. 1), pursuant to Section 106(a) of the Immigration and Nationality Act,

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reported to Congress (see Section 244(c)(2)) ended three days later, on December 19, 1975, when the House and Senate adjourned sine die. 121 Cong. Rec. 42014, 42277.

8 U.S.C. 1105a(a).[3] Chadha again argued that the one-House veto provision in Section 244(c)(2) of the Act is unconstitutional. The INS also took the position that Section 244(c)(2) is unconstitutional. For this reason, the INS suggested to the court of appeals that it invite the Senate and House of Representatives to file briefs (J.A. 1); at the court's invitation, they did so.

The court of appeals cancelled Chadha's deportation, holding that the one-House veto provision in Section 244(c)(2) of the Act contravenes the procedural requirements in Article I of the Constitution for the exercise of legislative power and violates the constitutional principle of separation of powers.

a. The court of appeals concluded that the provision for one House of Congress to override suspension decisions is not a valid exercise of Congress' legislative authority under Article I of the Constitution because a one-House veto does not comply with "important formal and procedural limitations" in Article I, Section 7—principally, the requirement "that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights" (J.S. App. 59a). Thus, the court reasoned, if Chadha's status under Section 244 prior to the passage of the resolution of disapproval by the House of Representatives was one of *nondeportability*, based on the Attorney General's determination that his deportation should be suspended, "then obviously that status cannot be changed by one house" (J.S. App. 59a). But the court found the procedure equally violative of Article I, Section 7, if it were to accept the House and Senate's contention that Chadha's status prior to passage of the House resolution was one of *deportability*, which could be altered only if both Houses failed to object to the suspension of his deportation during the relevant time period (J.S. App. 59a-60a):

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[3] The petition for review had the effect of staying the deportation order pending the court of appeals' resolution of the case. 8 U.S.C. 1105a(a)(3).

> The article I authorization to make law does not permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation which is not a final exercise of specifically delegated power to alter these legal rights, followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference.

The court held that this departure from the requirements in Article I of the Constitution for enacting positive legislation was not supported by Congress' conceded power under Article I, Section 8, to "establish an uniform Rule of Naturalization * * * [and] to make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers * * *." The latter clause, the court explained, "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of that power" (J.S. App. 56a).

b. The court of appeals also found the one-House veto provision in Section 244(c)(2) to be contrary to the established doctrine of separation of powers more generally embodied in the Constitution. The purpose of this separation, the court concluded, is to prevent the "dangerous concentration of power in one branch" (J.S. App. 29a) and, thereby, "to preclude the exercise of arbitrary power" (*id.* at 30a, quoting *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

The court acknowledged that some practical accommodation and interdependence among the branches is necessary (J.S. App. 34a, 36a). At the same time, however, it recognized that judicial intervention is required to correct those "departures [from the constitutional assignment of powers] which undermine * * * the purpose mutually to check component powers * * *" (*id.* at 34a).

Section 244(c)(2), the court concluded, is one such prohibited departure, because it allows one House of Congress to reverse a reasoned decision, "rendered under

the law," that "was reached after the Executive had given consideration to an individual case" (J.S. App. 53a). The court rejected the suggestion that this "interference with essential executive functions" (*ibid.*) is justified because Section 244(c)(2) was intended to permit Congress "to share in the administration of the statute" by "fill[ing] the interstices of statutory criteria" (J.S. App. 52a). In the court's view, such "addition of more precise statutory criteria on an accretive, case-by-case basis is, in short, law enforcement" (*ibid.*; footnotes omitted); it is not merely "an attempt to alter future conduct of the Executive or to change its instructions" (*id.* at 54a). The court concluded in this regard that the Attorney General's informed and consistent implementation of the statute would be "thwarted if legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed" (*id.* at 53a). Accordingly, Section 244(c)(2) "detracts from the authority of the second branch, and to that extent undermines its powers" (J.S. App. 53a-54a).

The court also rejected the related argument that the one-House veto could be viewed as a necessary "corrective device" (J.S. App. 47a) to remedy what either House of Congress might perceive to be misapplications of the statutory eligibility criteria in individual cases. "By assuming the task of correcting misapplications of the law," the court reasoned, "Congress is performing a role [that is] ordinarily a judicial or an internal administrative responsibility" (*id.* at 48a). In addition, the court found a potential for Section 244(c)(2) to result in arbitrary treatment of individual aliens because, under that Section, adjudications "may be set aside [by one House of Congress] for any reason, or no reason at all" (J.S. App. 50a), and "[t]here are virtually no procedural constraints on the ultimate congressional decision nor any provision for review of Congress' legal or factual conclusions" (*id.* at 51a). For these reasons, the court

concluded that Congress had violated the doctrine of separation of powers "by retaining a selective power to override individual adjudications, in lieu of changing standards prospectively by the usual, corrective device of a statutory amendment" (*ibid.*).[4]

SUMMARY OF ARGUMENT

I

A. Section 244(c)(2) of the Immigration and Nationality Act allows one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under the Act. The effect of a resolution passed by one House pursuant to that Section therefore is precisely the same as that of a duly enacted *law* amending the Act to exclude a particular alien from eligibility for relief. If Section 244(c)(2) had never been enacted, it is clear that a resolution passed by one House of Congress and not approved by the President or repassed by both Houses over his veto would not bind the Attorney General in his administration of the Act or affect the legal status of an individual alien.

The Senate and House of Representatives contend, however, that Congress may accomplish this result indirectly simply by enacting legislation *authorizing* either of its Houses to pass a resolution having binding effect. They assert in this regard that not every exercise of legislative power requires adherence to the constitutional

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[4] As explained in the Brief of Appellee-Respondent Chadha (at 7-10), the court of appeals also addressed a number of procedural and jurisdictional arguments raised by the congressional *amici*. The court of appeals rejected the House and Senate's contentions that it did not have jurisdiction of the case on Chadha's petition for review under Section 106(a) of the Act (J.S. App. 4a-11a). The court also concluded that Chadha had standing to challenge the constitutionality of Section 244(c)(2) (J.S. App. 12a-19a), that the case does not present a non-justiciable political question (*id.* at 20a-22a), that the case involves a concrete controversy satisfying Article III requirements (*id.* at 22a-24a); and that Chadha's marriage to a United States citizen did not moot the case (*id.* at 17a-18a n.6).

requirements for the making of a law. This contention is plainly incorrect, for this Court has made clear that the legislative power granted to Congress by Article I, Section 1, is " 'the authority to make laws' " (*Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976) (per curiam), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928)), and the Necessary and Proper Clause authorizes Congress "to make all *Laws*" for carrying into execution its enumerated powers.

The requirement of bicameral approval of all measures constituting the exercise of legislative power also is evident from Article I, Sections 1 and 8, which grant legislative power to *Congress*, not to either of the Houses of which it consists. Section 7, Clause 2 of Article I, then provides that "*Every* Bill" which shall have so passed the House of Representatives and the Senate "shall, before it becomes a Law," be approved by the President or be repassed over his veto. What is more, the Framers included a *second* Presentation Clause in Section 7, Clause 3, for the specific purpose of ensuring that the negative of the President could not be evaded by Congress simply by calling a measure intended to have the effect of a law something other than a "Bill"—*e.g.*, a "Resolution," the very label given the measure passed by the House of Representatives in this case.

By providing an opportunity for due deliberation by the two differently constituted Houses of Congress and a detached review of all proposed legislation by the President, the Framers intended to protect against improvident and ill-considered exercises of legislative power and encroachment upon the Executive. These concerns of the Framers are fully implicated when Congress or one of its Houses seeks to exercise legislative power by means of a "legislative veto" of Executive action.

The conclusion that the concurrence of both Houses and presentation to the President are required with respect to all exercises by Congress of its legislative powers is further supported by the fact that, in situations in which the Framers intended a *departure* from those re-

quirements, they *expressly* so provided. Of particular significance is the Treaty Clause in Article II, Section 2, which allows the Senate to participate in a form of "lawmaking" with the President, to the exclusion of the House. Other examples of departures from the norm of bicameral action and Presidential review are contained in Article I, such as in the Clauses pertaining to the internal organization of each House, impeachment, and adjournment. Significantly none of these examples involves the exercise of Congress' legislative power to regulate the affairs of persons outside the Legislative Branch, and each is explained by special attributes of the function involved and is accompanied by alternative checks on the legislature.

Nor can the unconstitutionality of Section 244(c)(2) be avoided simply by characterizing that Section in another way, as providing for the Attorney General to make a *recommendation* that *Congress* suspend an alien's deportation, which Congress then may approve by *inaction* if neither House passes a resolution of disapproval. This characterization is refuted by the language and legislative history of Section 244(c)(2). In any event, the history of the Presentation Clauses clearly shows that Congress cannot avoid submitting a legally binding resolution to the President simply by attaching a different label to it or by recharacterizing the process that led to its passage. Furthermore, the Constitution does not permit a substantive change in the law to be accomplished by the submission of an Executive recommendation to Congress, followed by mere inaction of the two Houses.

B. Section 244(c)(2) also violates the doctrine of separation of powers by directly involving one House of Congress in the execution of the Immigration and Nationality Act. That Section permits one House to overrule a decision of the Attorney General, much as the President might direct or overrule the decision of a subordinate official in the Executive Branch, and vests in Congress the final decision whether an individual alien will be deported under the Act.

The invalidity of Section 244(c)(2) in this respect follows a fortiori from the Court's decision in *Buckley* v. *Valeo*, *supra*. If, as the Court held in *Buckley*, Congress cannot vest in one of its Houses the authority to appoint the Officers of the United States who in turn will administer the laws, then surely Congress cannot take the more extreme step of vesting in one House itself the power to participate directly in the administration of the laws.

Section 244(c)(2) cannot be saved from invalidity on separation of powers grounds on the theory that the Executive is a mere agent of Congress who exercises whatever "legislative power" is delegated to it by Congress. The Executive does not exercise "legislative power"; that is the authority to *make* laws. The authority to execute the laws is granted directly by the Constitution, not "delegated" by Congress. Moreover, the Executive Branch is an independent agent of the *law*, not of Congress, as evidenced by the President's constitutional duty to take care that the "Laws" be faithfully executed. To the extent that the Legislative Branch may direct Executive action, it is only by passing such "Laws."

C. If Section 244(c)(2) were held to be constitutional, Congress apparently could pass legislation authorizing one of its Houses to overrule *any* order or decision of an Officer of the United States in his administration of the laws. The result would be to blend all legislative and executive powers in the same hands and to sanction a wholesale departure from the constitutionally prescribed means for exercising legislative power.

D. If the one-House veto provision in Section 244(c)(2) is held unconstitutional, it properly may be severed from the remainder of Section 244. The settled rule is that an unconstitutional provision may be severed unless it is *evident* that the legislature would not have enacted the remainder of the statute standing alone, and the presence of a strong severability clause in Section 406 of the Act greatly enhances the presumption of severability in this case. If Section 244 were struck down in its entirety,

Congress would be forced to grant permanent resident status itself through the passage of private bills. The legislative history makes clear, however, that for aliens covered by Section 244(c)(2), Congress specifically rejected the previous practice under which the granting of permanent resident status required such affirmative approval of both Houses.

II

The court of appeals had jurisdiction to consider the constitutional issue on Chadha's petition for review under Section 106(a) of the Act, which grants the courts of appeals "exclusive" jurisdiction of actions seeking judicial review of "final orders of deportation." The validity of the deportation order entered against Chadha is entirely dependent upon the validity of the one-House veto provision in Section 244(c)(2). Moreover, this Court held in *Foti* v. *INS*, 375 U.S. 217 (1963), that the court of appeals' jurisdiction under Section 106(a) encompasses not only the issue of the alien's deportability, but also a denial of suspension of deportation that is merged into a final order of deportation. Nothing in Section 106(a) or its legislative history suggests that constitutional challenges are implicitly excepted from the court of appeals' "exclusive" jurisdiction under that Section, and to force an alien to bring his constitutional challenge to a deportation order in a separate proceeding in the district court would undermine the congressional intent to create a single statutory form of judicial review.

This is not a "feigned" suit, as the House of Representatives suggests. The immigration judge and Board of Immigration Appeals simply followed the well-established practice of declining to rule on the constitutionality of a statute at the administrative level, thereby leaving such issues for judicial resolution, just as the Executive agencies did in *United States* v. *Lovett*, 328 U.S. 303 (1946). Nor are the House and Senate correct that Chadha cannot be heard to challenge the legislative veto provision in Section 244(c)(2) because it is not severable and because he therefore could not be afforded

relief from deportation even if he were to prevail on the constitutional issue. The legislative veto provision plainly is severable, and Chadha accordingly can be granted such relief and permanent resident status if the one-House veto provision is declared unconstitutional. But in any event, this Court has repeatedly held that a party may raise a constitutional challenge even if the provision in question ultimately may not be severed in a way that would entitle him to relief.

ARGUMENT

I. THE PROVISION IN SECTION 244(c)(2) OF THE IMMIGRATION AND NATIONALITY ACT AUTHORIZING ONE HOUSE OF CONGRESS TO DISAPPROVE THE ATTORNEY GENERAL'S DECISION SUSPENDING AN ALIEN'S DEPORTATION, AND THEREBY TO REQUIRE THE ATTORNEY GENERAL TO DEPORT THE ALIEN, IS UNCONSTITUTIONAL

Section 244(c)(2) of the Immigration and Nationality Act authorizes one House of Congress, acting alone, to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws. The effect of a resolution passed by one House under that Section is to amend the Act to exclude a particular alien from the relief generally afforded to aliens who are found by the Attorney General, after a hearing, to be eligible for suspension of deportation and permanent resident alien status. Section 244(c)(2) therefore authorizes an unconstitutional exercise of Congress' legislative powers, for it allows one House of Congress to take action having the effect of a law without regard to the explicit requirements in Article I of the Constitution that *any* resolution having such an effect must receive the concurrence of both Houses and be submitted to the President for his approval or disapproval. In the event of disagreement between Congress and the President, the congressional view may prevail only if two-thirds of each House concur. These fundamental protections against precipitate and improvident action by the

Legislative Branch and encroachment upon the Executive that are embodied in the Constitution cannot be evaded by mere legislation passed by Congress purporting to authorize such an evasion. Indeed, Congress is the very Branch of Government whose powers were intended by the Framers to be restrained by the requirements of bicameralism and presentation to the President.

Section 244(c)(2) also violates the doctrine of separation of powers under the Constitution by involving the Legislative Branch in the execution of a previously enacted law. It permits one House of Congress to overrule a particular determination made by the Officer of the United States charged with administering the Immigration and Nationality Act and to direct that Officer to make a different disposition of the case, just as the President might instruct subordinate Executive Branch officials in fulfillment of his constitutional obligation to "take Care that the Laws be faithfully executed" (Art. II, § 3). Such overruling of individual determinations under the Immigration and Nationality Act, when not accomplished by means of a duly enacted law amending that Act, plainly constitutes the execution of the law—a function that the Framers deliberately withheld from Congress and assigned instead to the President and other officers of the Executive Branch.

If Section 244(c)(2) were found to be constitutional, it would appear that Congress could pass general legislation permitting one of its Houses to disapprove *every* decision or action by the President or any other Officer of the United States in executing a law. The result would be to transform the process embodied in the Constitution for the exercise of legislative power, to strip the Executive Branch of the independence the Framers plainly intended it to have, and to transfer to the Legislative Branch the ultimate decision-making authority in the execution of the laws. This Court must reject the attempt by Congress to bring about such a fundamental restructuring of the form of government established by the Constitution.

A. Section 244(c)(2) Violates Article I of the Constitution Because It Authorizes One House of Congress To Exercise Legislative Power By Passing A Resolution That Has the Effect of a Law Without the Concurrence of the Other House Or Presentation to the President

1. *If Section 244(c)(2) Had Not Been Enacted, a Resolution Passed By One House And Not Presented to the President for Approval or Disapproval Clearly Would Not Bind the Attorney General or Affect Chadha's Legal Status*

Section 244(a)(1) of the Immigration and Nationality Act authorizes the Attorney General, in his discretion, to suspend the deportation of an alien and to grant permanent resident status to that alien if he satisfies certain threshold eligibility criteria and if his deportation would, "in the opinion of the Attorney General, result in extreme hardship to the alien" or to his spouse, parent, or child who is a citizen or permanent resident alien. See *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981). As a procedural matter, if the Attorney General determines that an alien is eligible for the relief afforded by Section 244 and that an exercise of discretion in favor of the alien is warranted, the Attorney General first suspends the alien's deportation. The Attorney. General then must submit a complete report of the case and the reasons for the suspension to Congress. Section 244(c)(1). The Act provides that if neither House of Congress passes a resolution disapproving the suspension, the Attorney General "shall" cancel the deportation proceedings and grant permanent resident status to the alien. Section 244(c)(2) and (d). However, if either House passes a resolution "stating in substance that it does not favor the suspension of deportation" (Section 244(c)(2)), the suspension is terminated and the Attorney General "shall" deport the alien (*ibid.*), notwithstanding the prior administrative determination that the alien is entitled to relief under the statute.

In the present case, after the immigration judge found Chadha eligible for relief under Section 244 and suspended his deportation, the House of Representatives passed a resolution stating that it "does not approve the granting of permanent residence in the United States" to Chadha and five other aliens (H.R. Res. 926, 94th Cong., 1st Sess. (1975); J.S. App. 69a). Following passage of this resolution, the judge entered an order of deportation against Chadha. Thus, as exemplified by this case, Section 244(c)(2) of the Immigration and Nationality Act allows one House of Congress to require the Attorney General to deport an alien who otherwise would not be deported under the immigration laws. The effect of a resolution passed by one House pursuant to Section 244(c)(2) therefore is precisely the same as that of a *law* amending the Immigration and Nationality Act to exclude a particular alien from the relief afforded to those aliens who are found by the Attorney General after a hearing to be eligible for and deserving of suspension of deportation and adjustment of status.

If Section 244(c)(2) had never been enacted, it could not seriously be contended that a resolution passed by only one House of Congress and not approved by the President or repassed by both Houses over his veto would bind the Attorney General in his administration of the Immigration and Nationality Act or affect the legal status of an individual alien under that Act. The explicit constitutional requirements of bicameral action and presentation to the President, contained in Sections 1, 7 and 8 of Article I, discussed below (see pages 21-26 *infra*), would stand as insuperable barriers to giving such a resolution the effect of a duly enacted law. See *United States* v. *California*, 332 U.S. 19, 27-28 & n.4 (1947); *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 180 (1901); *id.* at 184 (Brown, J., concurring); *New York Indians* v. *United States*, 170 U.S. 1, 23 (1898); *Field* v. *Clark*, 143 U.S. 649, 669-672 (1892); 6 Op.

Att'y Gen. 680 (1854).[5] A resolution passed by just one House can be a useful means by which that House may express its opinion on a particular matter pending before an Executive officer.[6] But mere opinions of the Legislative

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[5] In the Attorney General's opinion cited, Attorney General Cushing was concerned with the effect of congressional resolutions that purported to direct the payment of a claim that previously had been denied under an Act of Congress by the Commissioner of Pensions and Secretary of the Interior. His reasoning is equally applicable here (6 Op. Att'y Gen. at 684-685; first and third emphasis added):

> [T]he Constitution has *not* given to either branch of the legislature the power, by separate resolution of its own, to construe, judicially, a general law, or to apply it executively to a given case. And its resolutions have obligatory force only so far as regards itself or things dependent on its own separate constitutional power.
>
> *Any other view of the subject would result in the absurd conclusion that a separate resolution of either House could repeal or modify an act of Congress.* For, as the Supreme Court well say, in one of the cases before cited, a Head of Department "must exercise his judgment in *expounding* the acts and resolutions of Congress, under which he is, from time to time, required to act." That exposition of the law, conscientiously made by him, and with the aid of the law officer of the Government, is the law of the case. * * * In fine, it becomes the law; that is, the authorized construction of the legal intendment of the act of Congress. *That ascertained legal intendment of a statute cannot be authoritatively changed by a separate resolution of either or of both Houses; but only by a new act of Congress.*

See also S. Rep. No. 1335, 54th Cong., 2d Sess. 2, 8 (1897), discussed at note 12 *infra*; VII *Cannon's Precedents of the House of Representatives* § 1037, at 150 (1935) ("A concurrent resolution is without force and effect beyond the confines of the Capitol"), quoting 42 Cong. Rec. 2661 (1908) (remarks of Rep. Mann, referring to S. Rep. No. 1335 *supra*).

[6] See *Jefferson's Manual of Parliamentary Practice*, Section XXI (1797) ("When the House commands, it is by an 'order.' But fact, principles, and their own opinions and purposes, are expressed in the form of resolutions."), *reprinted in* H.R. Doc. No. 96-398, 96th Cong., 2d Sess. 173 (1981). Concurrent resolutions now are utilized to express the opinions of the two Houses. *Id.* at 173, § 396, citing II *Hinds' Precedents of the House of Representatives* §§ 1566, 1567, at 1029 (1907).

Branch, or one of its Houses, obviously do not have the force of a law. See *Train* v. *City of New York*, 420 U.S. 35, 45 (1975) ("legislative intention, without more, is not legislation").[7] Indeed, in this case, neither the Senate nor the House contends that it has the authority under the Constitution, standing alone, to pass a resolution having binding effect on the Attorney General or any other Executive officer in the performance of his official duties or affecting the legal rights and liabilities of persons outside the Legislative Branch.

The House and Senate do contend, however, that Congress may accomplish what the Constitution does not permit simply by enacting legislation authorizing either House to pass a resolution that purports to bind the Executive and have a legal effect upon private parties and requiring the Executive to abide by such a resolution. Thus, although the House of Representatives repeatedly insists (Br. 33, 36-39) that one House's passage of a resolution of disapproval pursuant to Section 244(c)(2) is an exercise of Congress' "legislative power" over immigration and naturalization, the House nevertheless argues (Br. 39-41) that Article I of the Constitution does not require affirmative bicameral action and presentation to the President every time such legislative power is exercised. The Senate makes essentially the same argument, asserting (Br. 32) that although Congress has retained to itself "the ultimate responsibility of determining when to waive the mandatory provisions of the deportation laws," the approval or dis-

[7] See T. Cooley, *A Treatise on Constitutional Limitations* 266 (8th ed. 1927):

> [N]ot only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.

approval by one House of a suspension of deportation in a particular case does not require the concurrence of the two Houses or presentation to the President (Br. 33). Contrary to the House and Senate's assertion, however, the text of the Constitution and the debates surrounding its adoption conclusively refute the contention that certain exercises of legislative power are implicitly exempt from the constitutional requirements of bicameral action and presentation to the President.

2. *The Constitution Explicitly Requires That All Congressional Actions Constituting the Exercise of Legislative Power Receive the Concurrence of Both Houses And Be Presented to the President for His Approval or Disapproval*

The Constitution plainly bars Congress from assigning to one of its Houses, acting alone, the authority to exercise legislative power by passing measures that are intended to have legal effect outside the Legislative Branch. Such lawmaking may be accomplished only by the combined action of both Houses of Congress and the President, or by two-thirds of each House in the event of Presidential disagreement.

Article I, Section 1 of the Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

As this Court has stressed, the legislative power granted by Article I is "the authority to make laws." *Buckley* v. *Valeo*, 424 U.S. 1, 139 (1976), quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); see also *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923). In the words of Chief Justice Marshall, "[c]ould it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation?" *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819); see also *The Pocket Veto Case*, 279 U.S. 655, 682 (1929), quoted in note 11 *infra*.

That Congress may exercise its "legislative Powers" only through the making of laws also is evident from the face of Article I, Section 8 of the Constitution. Section 8 enumerates the "legislative Powers" to which Section 1 of Article I refers, including that conferred by Clause 4, involved in this case, "[t]o establish an uniform Rule of Naturalization." The last Clause in the Section then authorizes Congress "to make all *Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof" (Art. I, § 8, cl. 18; emphasis added). The Clause could not be plainer that Congress is to exercise its legislative powers by making "Laws." See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-588 (1952). Indeed, as Alexander Hamilton stated in explaining the import of the Necessary and Proper Clause:

> What is a LEGISLATIVE power but a power of making Laws? What are the *means* to execute a LEGISLATIVE power but Laws?

The Federalist No. 33 (A. Hamilton), at 204-205 (J. Cooke ed. 1961).[8] See also *The Federalist* No. 75 (A. Hamilton), at 504 ("The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society").

The conclusion that Congress can regulate the affairs of persons outside the Legislative Branch only through the passage of laws is compelled as well by the very explicitness of the Constitution regarding the manner in which legislative power is to be exercised and the "Laws" of which the Constitution speaks are to be made. Because Article I, Section 1 vests "*All* legislative Powers" jointly in the Senate and House of Representatives (emphasis added), *every* bill or resolution constituting an exercise of legislative power—*i.e.*, every action that will

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[8] All citations to *The Federalist* are to the J. Cooke edition, unless otherwise noted.

have the effect of a law binding persons outside the Legislative Branch[9]—must be passed by both the Senate and the House.[10] This requirement of bicameral action is embodied as well in Article I, Section 8, which provides that "The Congress," not either of the Houses of which it consists (see Art. I, § 1; *Wright* v. *United States*, 302 U.S. 583, 587 (1938)), shall have the enumerated powers, including the establishment of a uniform rule of naturalization and the making of necessary and proper "Laws." Section 7, Clause 2 of Article I, then provides, in pertinent part (emphasis added):

> Every Bill *which shall have passed the House of Representatives and the Senate*, shall, before it be-

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[9] Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302, 309 (1979).

[10] The requirement of a concurrence by both Houses, embodied in Article I, Section 1, is illuminated by the debates of the Constitutional Convention on that Section. The version of what is now Article I, Section 1, that was contained in the draft constitution reported by the Committee of Detail on August 6, 1787 provided:

> The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall[,] in all cases[,] have a negative on the other.

2 M. Farrand, *The Records of the Federal Convention of 1787*, at 177 (1966). In the debate on this provision the following day, Madison moved to strike out the language providing that each House would have a negative on the actions of the other, "the idea being sufficiently expressed in the preceding member of the Article; vesting the 'legislative power' in 'distinct bodies' especially as the respective powers and mode of exercising them were fully delineated in a subsequent article." *Id.* at 197. The "mode of exercising" the legislative power set forth in a "subsequent article" was through the enactment of a law. See *id.* at 182. Madison's motion carried (*id.* at 197), and the clause was referred to the Committee of Style without the language appearing after the semi-colon (*id.* at 565). The substance of this provision was reported by that Committee to the Convention in the form subsequently adopted as Article I, Section 1. 2 Farrand, *supra*, at 590. The Committee's addition of the word "All" to the beginning of Section 1 further confirms that the concurrence of the two Houses is required for *all* exercises of legislative power.

> comes a *Law*, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated.

If the President disapproves the bill, "it shall become a *Law*" only if two-thirds of each House vote to override the President's veto (*ibid.*; emphasis added).[11]

If Clause 2 of Section 7 had stood alone, it might have been possible to argue that the requirement of presentation to the President could be evaded if Congress or one of its Houses sought to exercise legislative power by some means other than the passage of a "Bill," to which Clause 2 expressly refers—*e.g.*, by passage of a "resolution," such as that passed by the House of Representatives in the instant case. But that very possibility was foreseen and foreclosed by the Framers. During the debate on Clause 2 of Article I, Section 7, Madison—

> observing that if the negative of the President was confined to *bills*; it would be evaded by acts under the form and name of Resolutions, votes &c—proposed that "or resolve" should be added after "*bill*" • • • with an exception as to votes of adjournment &c.

2 M. Farrand, *The Records of the Federal Convention of 1787*, at 301 (1966) (emphasis in original). Although Madison's proposal at first was rejected (*id.* at 302), it was renewed the following day by Edmund Randolph, who put the proposal in a new form that was adopted by a 9 to 1 vote (*id.* at 304-305). This provision is embodied in Clause 3 of Article I, Section 7:

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[11] In *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court, in referring to the requirement in Article I, Section 7, Clause 2, that a bill disapproved by the President be passed by two-thirds of each House in order to become a law, stated that " 'the context leaves no doubt that the provision was dealing with the two houses as *organized and entitled to exert legislative power*,' that is, the legislative bodies 'organized conformably to law for the purpose of *enacting legislation*' " (279 U.S. at 682, quoting *Missouri Pacific Ry.* v. *Kansas*, 248 U.S. 276, 280-281 (1919) (emphasis added)).

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representative may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

As we have explained (see pages 22-24 *supra*), the "Concurrence" of the Senate and House of Representatives is "necessary" under the Constitution whenever Congress seeks to exercise the "legislative Powers" granted by Article I, Sections 1 and 8 to the two Houses jointly.[12]

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[12] The Senate Judiciary Committee interpreted Section 7, Clause 3 in precisely this manner after a thorough historical study in 1897, remarking that the concurrence of both Houses and presentation to the President is necessary under the Constitution in the case of all resolutions that "contain matter which is properly to be regarded as legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897)). Based on a comprehensive review of resolutions passed from the time of the First Congress, the Committee concluded (*id.* at 2; emphasis added):

> [T]he phrase [in Art. I, § 7, cl. 3] "to which the concurrence [of the Senate and House of Representatives] may be necessary" should be held to refer to the "concurrence" made "necessary by the other provisions of the Constitution and not to mere form of the procedure; so that no mere resolution, joint, concurrent, or otherwise need be presented to the President for his approval unless it relates to matter of legislation to which the Constitution requires the concurrence of both Houses of Congress and the approval of the President—in other words, *unless such Congressional action be the exercise of "legislative powers" vested in Congress under the provisions of section 1, article 1.*

In any event, it is clear that the Framers could not have intended for Congress to be able to evade the presentation requirement in Clause 3 of Article I, Section 7, merely by delegating to one of its Houses the authority to pass a resolution purporting to have binding legal effect outside the Legislative Branch. As one commentator has observed: "It verges on irrationality to maintain that

Sections 1, 7, and 8 of Article I of the Constitution thus make clear that the concurrence of the other House and presentation to the President are required in *any* instance in which one House of Congress seeks to exercise Congress' legislative powers by passing a resolution having the effect of a law.[13] The one-House veto provision in Section 244(c)(2) is unconstitutional because it authorizes either House of Congress to pass a binding resolution that does not comply with these explicit requirements.

3. *A Consideration of the Purposes the Framers Intended to Be Served By the Requirement of Bicameral Approval and Presentation to the President Strongly Reinforces the Conclusion that the One-House Veto Provision in Section 244(c)(2) is Unconstitutional*

A consideration of the intent of the Framers underlying the constitutional principles of bicameralism and Presidential review of legislation strongly reinforces the conclusion, compelled by the text of Article I itself, that the one-House veto provision in Section 244(c)(2) is unconstitutional. The debates surrounding the adoption of the Constitution leave no doubt that the procedure established in that document for the exercise of legislative power was not a mere formality to be disregarded, as the Senate and House of Representatives urge, whenever

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action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt." Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1066 n.428 (1975). *Cf. Powell* v. *McCormack*, 395 U.S. 486, 536-537 n.69 (1969).

[13] See also Section 11 of the Northwest Territory Ordinance, passed on July 13, 1787, while the Constitutional Convention deliberated. That Section provided that all bills that passed both chambers of the territorial legislature would be referred to the governor for his assent, "but no bill, or *legislative act whatever*, shall be of any force without his assent" (emphasis added). The Northwest Territory Ordinance was reenacted by the first Congress (ch. 8, 1 Stat. 50).

Congress might believe it more convenient to exercise that power in some other way. To the contrary, the constitutional requirements that all measures having the effect of a law must receive the concurrence of both Houses and must be presented to the President for his approval or disapproval were intended to be fundamental checks against oppressive, improvident, or precipitate action by the Legislative Branch and encroachment by that Branch upon the Executive. The Framers' deep concern for safeguards in the procedure for regulating the affairs of the Nation and the destiny of its people reflects as well their commitment to establish "a government of laws and not of men" (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *United States* v. *United Mine Workers*, 330 U.S. 258, 307-308 (1947) (Frankfurter, J., concurring)).

a. The principle of separation of powers that undergirds the Constitution was viewed by the delegates to the Constitutional Convention as a "vital check against tyranny" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 121; see, *e.g.*, *The Federalist* No. 47 (J. Madison), at 324), a check "essential to the preservation of liberty" (*The Federalist* No. 51 (J. Madison), at 348; see *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 348 U.S. at 635 (Jackson, J., concurring)). Accordingly, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 122.

The Framers were acutely aware, however, that "[i]n republican government the legislative authority, necessarily, predominates." *The Federalist* No. 51, *supra*, at 350. Indeed, "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 129; see *id.* at 129 n.166). One of the checks the Framers

fashioned against this potential, Madison explained, was "to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit" (*The Federalist* No. 51, *supra*, at 350).[14] But this division was intended to protect against tyranny by the legislature in a more direct way as well, by providing an internal check against corrupt, oppressive, improvident, or ill-considered legislative measures.

Thus, James Wilson, later a Justice of this Court, observed during the debates of the Constitutional Convention:

> Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory and practice proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. *In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.*

1 M. Farrand, *supra*, at 254 (emphasis added). Similarly, Madison, in expounding upon the necessity of the Senate, noted "the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders, into intemperate and pernicious resolutions." *The Federalist* No. 62 (J. Madison), at 418. This propensity would be checked, he maintained, by providing a greater opportunity for due deliberation in the course of consideration by the two differently constituted Houses. *Id.* at 417-419. See also *The Federalist* No. 63 (J. Madison), at 426-427.

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[14] One defect the Framers had perceived in the Articles of Confederation was their provision for a Congress consisting of a single chamber. *The Federalist* No. 22 (A. Hamilton), at 145.

The check of bicameralism also was expected to assure stability of the laws, particularly in view of the greater continuity of the Senate and the longer terms served by its Members. *The Federalist* No. 62, *supra*, at 419-422. "[M]utable policy," Madison stressed, "poisons the blessings of liberty itself" (*id.* at 421; emphasis added):

> It will be of little avail to the people that the laws are made by men of their own choice, * * * if they * * * undergo such incessant changes that no man who knows what the law is to-day can guess what it will be tomorrow. *Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?*

Madison feared that "the most deplorable effect" of such mutability would be the "diminution of attachment and reverance" the people would have towards the political system that fostered it. *Id.* at 422.

The views expressed by Madison regarding the fundamental importance of concurrent action by the two Houses of Congress in their exercise of legislative power were voiced time and again in the debates of the Constitutional Convention and the state ratifying Conventions.[15] See generally I J. Story, *Commentaries on the Constitution of the United States* §§ 545-570, at 381-394 (3d ed. 1858).

b. The provision in Article I, Section 7, of the Constitution that a measure which has received the concurrence of the Senate and House of Representatives cannot become a law unless approved by the President or repassed over his objections by two-thirds of each House was viewed as another aspect of the system of checks and

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[15] See, *e.g.*, 1 M. Farrand, *supra*, at 151, 421-423 (remarks of James Madison); *id.* at 414 (remarks of Oliver Elsworth); II *Elliot's Debates on the Federal Constitution* 285 (1836) (remarks of John Jay in the New York Convention); *id.* at 301-302, 316-317 (remarks of Alexander Hamilton in the New York Convention); *id.* at 445, 447-448 (remarks of James Wilson in the Pennsylvania Convention); *id.*, vol. IV, at 21 (remarks of Mr. Davie in the North Carolina Convention); *id.* at 257 (remarks of Charles Pinckney in the South Carolina Convention).

balances embodied in the Constitution as a "self-executing safeguard" against encroachment by the Legislative Branch upon the independence of the Executive. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 122. See *The Federalist* No. 51, *supra*, at 350; see also *The Federalist* No. 73 (A. Hamilton) at 497 (quoted at page 57 *infra*); *The Federalist* No. 66 (A. Hamilton), at 445-446; 1 M. Farrand, *supra*, at 97-106; *id.* at 139-140 (remarks of George Mason). But the Presentation Clauses also were intended by the Framers to "guard[] against ill-considered and unwise legislation." *The Pocket Veto Case*, *supra*, 279 U.S. at 678; see also *id.* at 677-678 n.4; *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 587. This Court has observed, for example, that "[i]t can hardly be gainsaid that resolutions secure passage more casually and less responsibly, in the main, than do enactments requiring Presidential approval." *United States* v. *Rumely*, 345 U.S. 41, 46 (1953). Thus, Hamilton explained in *The Federalist* No. 73, at 495-496, that conferring the veto power on the President

> encrease[s] the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government, at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them.

See generally 1 J. Story, *supra*, §§ 884-893, at 614-621.[16]

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[16] See also 1 M. Farrand, *supra*, at 108, 139 (remarks of James Madison); 2 M. Farrand, *supra*, at 73 (remarks of James Wilson); *id.* at 74, 587 (remarks of James Madison); *id.* at 78 (remarks of George Mason); 3 M. Farrand, *supra*, at 148-149 (remarks of James McHenry before the Maryland House of Delegates). But see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 285 (opinion of White, J.).

Moreover, as James Wilson stressed to the Pennsylvania Convention, lodging a power in the President to disapprove legislation was expected to serve a beneficial purpose because the President would feel a sense of responsibility to the Nation as a whole, not merely to particular parts thereof, as might elected representatives in the Congress. II *Elliot's Debates*, *supra*, at 448. See also *Myers* v. *United States*, 272 U.S. 52, 123 (1926). Wilson further emphasized that in reviewing a measure, the President "will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government." *Ibid.*; see also U.S. Const., Art. II, § 2, cl. 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices").

c. As this case well illustrates, the concerns of the Framers that underlie the constitutional requirements of concurrent action by the two Houses of Congress and presentation to the President apply with full force when one or both Houses seek to exercise legislative power by means of a "legislative veto" of Executive action. One need not question the good faith of the Members of the House of Representatives who proposed and voted for the resolution disapproving Chadha's deportation to notice that the resolution was passed in haste at the close of a legislative session in order to meet the deadline in Section 244(c)(2) for the passage of such a resolution. The resolution, which was not even available to the Members because it had not been printed, was approved on the basis of nothing more than Representative Eilberg's fleeting explanation that it was the Judiciary Committee's "feeling" that Chadha and the other aliens mentioned in the resolution did not satisfy the statutory eligibility criteria, especially that of "extreme hardship."

121 Cong. Rec. 40800 (1975); J.S. App. 67a-68a.[17] This is precisely the sort of precipitate action by a legislative body for which the Framers designed the "self-executing safeguard[s]" of due deliberation by a second body and review by the President.[18]

Furthermore, to the extent the House of Representatives' passage of the resolution rested on the Judiciary Committee's interpretation of the "extreme hardship" criterion, this Court observed just last Term that "[t]hese words are not self-explanatory, and reasonable men could easily differ as to their construction" (*INS* v. *Wang*, *supra*, 450 U.S. at 144). Accordingly, an exercise of legislative power that purported to apply this standard in a particular case might well have benefited from the opportunity for due deliberation and a detached second opinion that the Framers intended to be afforded by bicameral consideration of proposed legislation. Such an exercise of legislative power would have benefited as well from an opportunity for independent consideration by the President, after receiving the advice of the Attorney General and his delegates in the INS who are charged generally with administering the immigration laws and specifically with defining and applying the

[17] This is not to say, of course, that a duly enacted *law* must be preceded by extensive debate or supported by a public record establishing a full awareness on the part of the Members of the nature of their actions. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). The essential point is that the Framers expected that bicameral action and the prospect of review by the President would serve as *built-in* mechanisms to foster deliberation and awareness on the part of the Members. See, *e.g.*, J. Madison, *Notes of Debates in the Federal Convention of 1787*, at 63 (Ohio Univ. Press. ed. 1966).

[18] There is no indication in this case that passage of the resolution resulted from malice toward Chadha, either by the House of Representatives or its Members or by anyone outside that body. Nor is there any indication in this case that the House yielded to the forces of faction or momentary political or regional passion or "the artful misrepresentations of interested men" (*The Federalist* No. 63 (J. Madison), at 425). But these factors may be present in other cases, and Section 244(c)(2) and similar statutory provisions do not respect the constitutional checks against them.

"extreme hardship" criterion. *INS* v. *Wang*, *supra*, 450 U.S. at 144-145.

The Senate asserts (Br. 30), however, that Congress, acting through one of its Houses under Section 244(c)(2), does not review the decision of the Attorney General to grant suspension of deportation, but instead simply "exercises its own judgment whether permanent residence should be granted" in the particular case. See also House Br. 30-31. But such an ad hoc and largely standardless system of denying relief by means of the passage of congressional resolutions pursuant to a statute that remains unchanged in its general applicability undermines the "government of laws" the Framers intended and creates the instability and mutable rules that Madison warned would "poison[] the blessings of liberty itself" (*The Federalist* No. 62, *supra*, at 421). It also could lead to the loss of public confidence in and respect for the Government that Madison anticipated would result in the absence of the checks on legislative power that the Framers had fashioned (*id.* at 422).

Finally, the passage of a resolution by one or both Houses of Congress purporting to set aside an order issued by an Executive official after following statutorily prescribed procedures, and requiring a different disposition of the matter, plainly encroaches upon the independence and integrity of the President or other Officer of the United States charged with administering the statute in question. As the court of appeals observed, the Executive's decision in this case "was a reasoned one, rendered under the law," carrying with it "all the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch" (J.S. App. 53a). "Summary reversal of the Executive's decision by the Legislative Branch in a single case," without amendment of the general standards in the governing act or even the passage of a law creating an exception to those standards, "detracts from the authority of the second branch, and to that extent undermines its powers" (*id.* at 53a-54a). As noted above, the Presentation Clauses were designed to ensure

a measure of protection against such aggrandizement of the Legislative Branch at the expense of the dignity and authority of a co-equal Branch.

Thus, the intent of the Framers underlying the constitutional provisions at issue confirm what is manifest from the text of the Constitution itself: Congress cannot exercise its legislative powers through one or both of its Houses by means of a legislative veto of Executive decisions. By incorporating the principles of bicameralism and Presidential review of the exercise of the legislative power into the *Constitution*, the Framers intended to erect formidable and enduring checks against improvident legislative action and congressional encroachment upon the Executive. Such fundamental protections cannot be waived or dispensed with by mere *legislation* passed by the very branch of government whose powers were sought to be restrained. See *Marbury* v. *Madison*, *supra*, 5 U.S. (1 Cranch) at 176. Otherwise, these safeguards would be lost, perhaps permanently, whenever Congress was able to muster two-thirds of each House to override a Presidential veto of the legislation authorizing one or both Houses to adopt measures having the force of a law or whenever the President, because of the exigencies of the moment, felt compelled to approve such authorizing legislation. See, *e.g.*, Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357 (1953); cf. *United States* v. *Lovett*, 328 U.S. 303, 313 (1946).[19]

4. The Unconstitutionality of Section 244(c)(2) is Further Supported by the Fact That When the Framers Intended to Permit a Departure From the Requirements of Bicameral Action and Presentation to the President, They Expressly So Provided

The conclusion drawn from the text and debates surrounding the adoption of the Constitution—that concur-

[19] On a number of occasions a President has felt compelled to approve a bill containing a legislative veto provision. See, *e.g.*, Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. Rev. 423, 429 & n.23 (1978).

rence by both Houses of Congress and presentation to the President is required with respect to all exercises by Congress of its legislative powers under Article I—is further reinforced by the fact that, in other situations where the Framers intended a departure from those requirements, they expressly so provided. Examples are contained in both Article I and Article II of the Constitution.

Of particular significance is the Treaty Clause in Article II, Section 2. That Clause permits the President, by and with the advice and consent of the Senate, to conclude a treaty without any participation by the House of Representatives.[20] A treaty, of course, has the force and effect of law.[21] This express grant of power to the Senate to participate in "lawmaking" without involvement of the House of Representatives strongly indicates that, in the case of all other measures having the effect of a law—*i.e.*, all exercises of the "legislative Powers" conferred on Congress by Article I—concurrence of the two Houses and presentation to the President is required.[22] Indeed,

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[20] The Framers required the advice and consent of the Senate alone because the smaller number of Senators would be more conducive to the secrecy required in the conduct of the Nation's foreign affairs (*The Federalist* No. 64 (J. Jay), at 434-435) and because the longer term served by Senators would enable them "to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them" (*id.* at 434). See also *The Federalist* No. 75 (A. Hamilton), at 506-507.

[21] Treaties, like duly enacted laws, are "the supreme Law of the Land" (Art. VI, cl. 2). See, *e.g.*, *Missouri* v. *Holland*, 252 U.S. 416 (1920); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889).

[22] Although the check on improvident action afforded by bicameral consideration is not available in the case of treaties, the Framers adopted an *alternative* check in the treaty process—the requirement in Article II, Section 2, that two-thirds of the Senators present concur in the Senate's consent to a treaty, rather than the simple majority required for the passage of legislation. *The Federalist* No. 64 (J. Jay), at 438; *The Federalist* No. 66 (A. Hamilton), at 450; *The Federalist* No. 75 (A. Hamilton), at 507-509.

the requirement that the Senate consent to a proposed treaty, like the requirement in Article II, Section 2 that the Senate consent to the President's appointment of Officers of the United States,[23] is a form of one-House legislative "veto" over actions initiated by the President. The Framers' express provision for the exercise of such a veto power in certain circumstances suggests that the power cannot be exercised in other, unspecified circumstances.

This conclusion also is supported by reference to the circumstances in Article I itself in which the Framers provided for a departure from the bicameralism or presentation requirement. As in the case of treaties and appointments, addressed in Article II (see notes 20 & 22 *supra*), each such departure in Article I is readily explained by special circumstances that were determined by the Framers to make participation by the other House or review by the President inappropriate. And of special significance, none of these departures involves the exercise of the "legislative Powers" conferred on Congress by Article I—*i.e.*, actions that establish or alter the rights, duties or liabilities of persons outside the Legislative Branch.

Thus, Section 5 of Article I provides that each House shall be the judge of the election and qualifications of its own Members and shall keep a journal of its own proceedings. The same Section authorizes each House to determine the rules of its proceedings, compel the attendance of absent Members, punish its Members for disorderly behavior, and (with the concurrence of two-thirds) expel a Member. None of these authorizations involves the exercise of legislative powers; rather, all are essen-

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[23] The House of Representatives was excluded from the appointment process because the number of Members in that Body and its more fluctuating membership would defeat the stability of that process and the administration of the laws. *The Federalist* No. 77 (A. Hamilton), at 519. It also was thought that "infinite delays and embarassments" might be occasioned by requiring the concurrence of the House of Representatives (*ibid.*).

tially internal matters for each House and are necessary incidents to the independence of each. For these reasons, they do not require the concurrence of the other House or, consequently, presentation to the President under Section 7, Clause 3, of Article I. Of a similar nature are the provisions for each House to choose its own officers (Art. I, § 2, cl. 5; Art. I, § 3, cl. 5). See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 127-128; I J. Story, *supra* § 687, at 475-486; *id.* § 741, at 517.

The House of Representatives and Senate also are granted, respectively, the sole power of impeachment and of trying impeachments (Art. I, § 2, cl. 5; Art. I, § 3, cls. 6 and 7). Although the exercise of these powers obviously affects persons outside the Legislative Branch, the powers are of a judicial rather than legislative nature (see *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880); *The Federalist* No. 65 (A. Hamilton)), their impact is limited to persons occupying positions in the government, and the consequences of conviction include only removal of the official from office and his disqualification from holding any federal office thereafter (Art. I, § 3, cl. 7). Furthermore, the Constitution expressly forecloses any negative by the President in the impeachment process by providing in Article II, Section 2, Clause 1, that the President's power to grant reprieves and pardons for offenses against the United States does not apply "in Cases of Impeachment."[24] The Framers adopted an alternative protection against arbitrary action in cases of impeachment, however, by requiring the concurrence of two-thirds of the Senators present for a conviction. *The Federalist* No. 66, *supra*, at 466.[25]

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[24] This foreclosure was thought necessary in order to guard against the possibility that the President would shelter his adherents (who often might hold an office in the government) from the effects of impeachment and conviction or might himself be involved in the offense giving rise to impeachment. *The Federalist* No. 69 (A. Hamilton), at 466.

[25] Each House also has the implied authority under Article I to initiate investigations into areas of possible legislation and to compel the production of information for that purpose. See, *e.g.*,

The only occasion, aside from the passage of a law, on which Article I requires the concurrence of both Houses is when one House seeks to adjourn for more than three days or to another place (Art. I, § 5, cl. 4). But a concurrent resolution pertaining to adjournment is expressly excepted from the requirement in Article I, Section 7, Clause 3, that any resolution or vote requiring the concurrence of the House and Senate be presented to the President. This exception serves to ensure a measure of protection for the independence of the Legislative Branch in its deliberations (see I J. Story, *supra*, §§ 843-844, at 582-583), and, in any event, adjournment does not constitute the exercise of legislative power having a legal effect on persons outside that Branch, whose interests might be protected through the President's veto power.[26] It is significant, though, that even with respect to the adjournment of Congress, the Constitution provides an alternative means of participation by the President in appropriate circumstances. Art. II, § 3.[27]

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491, 504-507 (1975). But this power of investigation may be exercised only in aid of possible future legislation; it does not encompass a "'"general" power to inquire into private affairs.'" *Id.* at 504 n.15, quoting *McGrain* v. *Daugherty*, 273 U.S. 135, 173 (1927).

[26] The Court also has held that a resolution proposing an amendment to the Constitution, passed as required by two-thirds of each House (Art. V), need not be presented to the President for his approval or disapproval. *Hollingsworth* v. *Virginia*, 3 U.S. (3 Dall.) 378 (1798). But the proposing of constitutional amendments is not an exercise of legislative power under Article I (*id.* at 381 n.*; Chase, J.), to which the Presentation Clauses apply. Moreover, the requirement that a constitutional amendment command the vote of two-thirds of each House provides a degree of protection against encroachment upon the Executive and improvident measures that is substantially equivalent to that in the Presentation Clauses, which permit a veto by the President to be overridden by a like vote. The requirement of ratification by three-fourths of the States, of course, provides even greater protection.

[27] Section 3 of Article II provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."

In short, the Constitution prescribes the means by which Congress' "legislative Powers" may be exercised: concurrence of both Houses and the President, or by a two-thirds majority of both Houses. Exceptions to these principles were provided in other circumstances only in response to the clearly expressed or manifest exigencies of the particular function involved (see pages 35-38 & notes 20, 22-26 *supra*). Moreover, when they departed from the general constitutional norm of bicameral action and Presidential review, the Framers were careful to furnish, where feasible, an alternative means of protection against arbitrary action by the Legislative Branch, such as a provision for action by two-thirds of the particular House concerned. In view of this meticulous attention to the system of checks upon the Legislative Branch that pervades the text of the Constitution (as well as the debates surrounding its adoption), accepted principles of construction compel the conclusion that Congress may not dispense with the requirements of bicameral action and Presidential review whenever the Constitution itself does not affirmatively authorize a departure from those requirements. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 127; *Nevada* v. *Hall*, 440 U.S. 410, 425 (1979); *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 182; see also *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 6, and cases cited.

No provision of the Constitution affirmatively authorizes such a departure in the case of a legislative veto of Executive actions in the administration of the laws. Moreover, the Constitution does not afford any alternative check on arbitrary legislative action in such circumstances, and there are no attributes of legislative vetoes that would make bicameral action or presentation to the President inappropriate under the system of checks and balances fashioned by the Framers. Legislative vetoes, such as those authorized by Section 244(c)(2) of the Immigration and Nationality Act, therefore are foreclosed by the Constitution.

5. *The Constitutional Requirements of Bicameralism and Presentation to the President Cannot Be Avoided by Characterizing Section 244(c)(2) as Something Other Than a Legislative Veto*

The House of Representatives contends (Br. 27-32, 39-40) that the explicit Article I requirements of bicameral action and presentation to the President applicable to all congressional measures constituting the exercise of legislative power may be avoided if only the operation of Section 244(c)(2) were to be characterized in a different way. Thus, the House argues (Br. 27-28), a resolution passed by one House of Congress pursuant to that Section is not really a constitutionally proscribed "legislative veto" of the Attorney General's determination that the alien is eligible for and deserving of relief under the Act. Rather, in the House's view, the favorable administrative action is merely a recommendation by the Attorney General that Congress grant relief (Br. 31, 39-40), after which Congress exercises "its own final and independent judgment on the matter" (Br. 28). Under the House of Representatives' characterization, even after the Attorney General makes a determination in the alien's favor and suspends his deportation, cancellation of deportation and adjustment of status are granted only when "Congress has *approved by inaction* a change in the status of the alien pursuant to Section 244(c)(2)" (Br. 31; emphasis added). The Senate makes a similar argument. Br. 29-30. There are at least three major flaws in this analysis.

First, the text of Section 244 itself refutes the House of Representatives' contention that a resolution passed pursuant to that Section is not a "legislative veto" of the Attorney General's determination that the alien is eligible for and deserving of relief. If the Attorney General makes such a determination and consequently suspends the alien's deportation, Section 244(c)(2) authorizes either House of Congress to pass a resolution "stating in substance that it does not favor the suspension of

such deportation." Thus, by the terms of the statutory authorization, such a resolution affirmatively rejects or disapproves—"vetoes"—the suspension of deportation ordered by the Attorney General in his administration of the Act. See also H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952) ("adjustment of status will become final in [the] absence of adverse action by either the Senate or House of Representatives"); S. Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952) (same).[28]

Second, even if the Senate and House of Representatives' strained characterization of Section 244(c)(2) were correct, which it is not, this would not aid them in evading the requirements of the Presentation Clauses. As the House of Representatives concedes (Br. 31), if Congress takes no action whatever within the period available to it following the Attorney General's order suspending deportation, deportation proceedings are cancelled, the temporary suspension of deportation becomes final, and the Attorney General then must grant the alien permanent resident status. A resolution of disapproval intervenes to prevent these events from occurring and, in addition, *requires* the Attorney General to deport the

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[28] In arguing that the Attorney General's order suspending deportation is only a recommendation subject to approval by Congress, the House relies (Br. 31) upon *Jay* v. *Boyd*, 351 U.S. 345, 351 (1956). See also Senate Br. 25 n.39. But that case discussed the suspension of deportation of aliens covered by 8 U.S.C. (1952 ed.) 1254(a)(5). The Attorney General could cancel deportation proceedings and grant permanent resident status to such an alien only if Congress took *affirmative action* by passing a concurrent resolution stating in substance that it favored the suspension of deportation; if Congress took no action, the alien had to be deported. 8 U.S.C. (1952 ed.) 1254(c); compare 8 U.S.C. 1254(a)(2) and (c)(3). The present Section 244(c)(2) works in precisely the opposite manner. The alien's deportation is cancelled and he attains permanent resident status only in the absence of action by Congress. Thus, *Jay* v. *Boyd* in no way supports the House's characterization of the statutory scheme as one under which the Attorney General merely makes a recommendation and Congress grants permanent resident status by *inaction*.

alien. See Section 244(c)(2). Thus, in whatever manner it may be described, a resolution passed by only one House of Congress pursuant to Section 244(c)(2) undeniably has a legal effect on persons outside the Legislative Branch, both by binding the Attorney General in his administration of the Immigration and Nationality Act and by affecting the legal status and liberty of the individual alien. The resolution therefore plainly is "legislative in its character and effect" (S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897); see note 4 *supra*), even if not in name. As we have explained above (see pages 24-25 *supra*), the Framers added Clause 3 to Article I, Section 7, of the Constitution for the specific purpose of preventing Congress from evading the President's constitutionally mandated participation in lawmaking by labeling a legislative act something other than a "Bill"—*e.g.*, a "Resolution." Accordingly, Congress cannot evade the explicit requirements of the Constitution here simply by characterizing the evasion in a different way and labeling the means of accomplishing it a "resolution" stating that the House concerned "does not favor" a suspension of deportation.

Finally, recognition of a power in Congress to work a change in the law as applied to a particular alien through what the House of Representatives labels (Br. 31) "approv[al] by inaction" of an Executive recommendation would constitute a radical transformation of the respective roles of the Legislative and Executive Branches in the making of laws. Article II, Section 3, of the Constitution authorizes the President to recommend to Congress such "Measures as he shall judge necessary and expedient." But those measures do not become laws unless they "shall have passed" each House of Congress (Art. I, § 7, cl. 2)—*i.e.*, unless they have received the approval of each House through affirmative action—and shall have been approved by the President or repassed over his objections. Under the Senate and House's characterization, however, the Attorney General's recommendation becomes the "law" affecting the alien (the

equivalent, as it were, of a private law granting relief) in the absence of affirmative action by either House. As the court of appeals observed, moreover, the inaction of either House could be ascribed variously to "endorsement, acquiescence, passivity, indecision, or indifference" (J.S. App. 60a)—or, we might add, to inattention or inadvertence.[29]

Thus, accepting, arguendo, the House and Senate's premise that Section 244(c)(2) is intended to permit Congress to change an alien's legal status by approving the Attorney General's recommendation through inaction, the Section necessarily is invalid because it does not require the affirmative "Concurrence" of the two Houses made "necessary" by the Constitution (Art. I, § 7, cl. 3) for the enactment of positive law. Furthermore, because under this view the Attorney General's decision would become a "law" without any action by Congress, the Executive would, in effect, make the laws, not merely recommend and later approve or disapprove them in the manner prescribed in Article II, Section 3, and the Presentation Clauses. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123, quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, 343 U.S. at 587-588. Viewed in the manner the Senate and House of Representatives suggest, then, the one-House veto provision entails a reversal of the constitutionally prescribed roles of the Legislative and Executive Branches in the making of laws.

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[29] The failure of either House to adopt a resolution of disapproval also might reflect nothing more than the internal rules of each House or the strong opposition of a small minority of the House's membership. For example, in the present case, the resolution was discharged from the Judiciary Committee and brought to a vote pursuant to a unanimous consent agreement (121 Cong. Rec. 40800 (1975); J.S. App. 67a-68a), under which the objection of a single Member might well have prevented the resolution from being passed before the statutory deadline.

B. Section 244(c)(2) Violates the Constitutional Principle of Separation of Powers Because it Authorizes One House of Congress To Participate in the Execution of A Previously Enacted Law

1. *A Resolution Passed by one House of Congress That Overrules the Attorney General's Decision Under Section 244(c)(2) and Thereby Requires the Deportation of An Alien Constitutes The Execution of the Law, in Violation of the Separation of Powers*

In addition to violating the requirements in Article I of the Constitution for the making of a new law applicable to an individual alien, Section 244(c)(2) of the Immigration and Nationality Act also contravenes the constitutional doctrine of separation of powers by directly involving one House of Congress in the execution of a previously enacted law. Section 242(b) of the Act assigns to the Attorney General the administrative responsibility to commence and conclude deportation proceedings against an alien. Sections 244(a)(1) and (c)(1) grant the Attorney General the authority to determine in those proceedings whether the alien is eligible for and deserving of suspension of deportation and permanent resident status under the statutory criteria. Performance of these functions plainly constitutes the execution of the law.[30]

Section 244(c)(2) authorizes either House of Congress to overrule the Attorney General's determination that an individual alien is eligible for and deserving of suspension of deportation and permanent resident status and

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[30] The Court noted in *Buckley* v. *Valeo* that "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3" (424 U.S. at 138). The authority to commence deportation proceedings and to cancel them in appropriate circumstances (see *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1869)) is of a similar nature.

to require the Attorney General, instead, to deport the alien. That Section therefore vests the final decision-making authority pursuant to an Act of Congress, not in the President or the Officer of the United States appointed by him to administer that Act, but in one House of Congress itself. Indeed, the power exercised by the Senate or House of Representatives pursuant to Section 244(c)(2) is precisely the same as that which might be exercised by the President in overruling or directing the decision of a subordinate Executive Branch official in appropriate circumstances, pursuant to his constitutional responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3. Such congressional overruling of an Officer of the United States in the performance of his official duties, if not accomplished by the passage of a new law that amends the statutory provision the Officer construed and applied in reaching his decision, constitutes the execution of the law. For Congress both to make and to execute the law in this fashion would violate the most fundamental principle embodied in the Constitution: that of the separation of powers.

In *Buckley* v. *Valeo*, *supra*, 424 U.S. at 120, the Court emphasized the "intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." The Framers' intent in this regard was influenced by Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct. *Ibid.* Thus, Madison explained, quoting Montesquieu:

> "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the *same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

The Federalist No. 47, *supra*, at 326 (emphasis in original). In a passage quoted by the court of appeals, Blackstone similarly noted that in such a regime, "[t]he magistrate

may enact tyrannical laws, and execute them in a tyrannical manner, *since he is possessed, in quality of dispenser of justice, with all the power which he, as legislator, thinks proper to give himself.*" J.S. App. 31a, quoting 1 W. Blackstone, *Commentaries* 142-143 (1979) (emphasis added).

"The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 124. Thus, the Constitution vests "All legislative Powers" granted by the Constitution in Congress (Art. I, § 1), the "executive Power" in the President (Art. II, § 1), and the "judicial Power of the United States" in the supreme Court and in such inferior Courts as Congress may ordain and establish (Art. III, § 1). As Chief Justice Marshall observed, "[t]he difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law" (*Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825)). See also *Buckley* v. *Valeo*, *supra*, 424 U.S. at 139, quoting *Springer* v. *Philippine Islands*, *supra*, 277 U.S. at 202.

In making the law, Congress may either legislate with great precision or, instead, "commit something to the discretion of the other departments." *Wayman* v. *Southard*, *supra*, 23 U.S. (10 Wheat.) at 46). But whatever the degree of specificity in the legislation, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the *Executive* to administer the laws and for the courts to enforce them when enforcement is sought." *TVA* v. *Hill*, 437 U.S. 153, 194 (1978) (emphasis added). When Congress has made its policy judgment by enacting a law, the legislative function comes to an end. The Constitution vests the implementation of that policy in the Executive. That concept is the essence of separation of powers. This Court, in the very cases upon which the Senate and

House of Representatives rely, has recognized that this principle applies with equal force with respect to the exclusion and expulsion of aliens. Thus, in *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893) (House Br. 35 n.28, 36, 48), the Court stated:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, *and to be executed by the executive authority according to the regulations established*, except so far as the *judicial* department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

149 U.S. at 713 (emphasis added). See also *Mahler* v. *Eby*, 264 U.S. 32, 40 (1924) (House Br. 19, 27); cf. *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 335-336 (1909) (House Br. 34; Senate Br. 31); *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972) (House Br. 28, 34, 35; Senate Br. 31).

In view of the explicit distribution of powers among the three Branches, this Court observed in *Buckley* v. *Valeo* that " 'it is a breach of the National fundamental law if Congress * * * by law attempts to invest itself or its members with either executive power or judicial power.' " 424 U.S. at 121-122, quoting *Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928). That is precisely what Congress has attempted to do in Section 244(c)(2) of the Immigration and Nationality Act. As Madison explained in *The Federalist* No. 48, *supra*, at 332.

> It is agreed on all sides that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers.

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 630 (1935). This principle is violated by Section 244(c)(2), because Congress has delegated to either of its Houses the final authority to "administer" suspensions of deportation where the Attorney General has made a determination in favor of the alien and to "overrule" the Attorney General's decision when it so desires.[31]

2. *The Unconstitutionality of Section 244(c)(2) Follows A Fortiori from This Court's Decision in* Buckley v. Valeo

The invalidity of Section 244(c)(2) on separation of powers grounds follows a fortiori from this Court's decision in *Buckley* v. *Valeo*. There, the Court held unconstitutional a statutory provision authorizing the President *pro tempore* of the Senate and the Speaker of the House of Representatives to appoint members of the Federal Election Commission. 424 U.S. at 109-141. In arriving at this conclusion, the Court extensively ex-

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[31] The only reference to the views of the Framers in the entire brief of the House of Representatives is to Madison's statement that Montesquieu's maximum regarding the separation of powers among different departments of government did not mean "that these departments ought to have no *partial agency* in, or no *controul* over the acts of the other." Br. 23, quoting *The Federalist* No. 47, *supra*, at 325 (emphasis in *The Federalist*). But the House overlooks the fact that Madison was defending the Constitution against the charge that the three branches were not *entirely* separate from each other (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 120), in view of such *express* provisions in the Constitution as those granting the House and Senate powers relating to impeachment and conferring a qualified veto power on the President (see, *e.g.*, *The Federalist* No. 47, at 325-331)—provisions that were intended to furnish a system of *checks* on the powers of the other branches. See, *e.g.*, *Buckley* v. *Valeo*, *supra*, 424 U.S. at 121; *The Federalist* No. 51 (J. Madison), at 348-350, Madison's statement does not suggest that a court may sanction other departures from the separation of powers doctrine where the Framers have not so provided, based on nothing more than the court's own assessment of whether the departures would result in only a "partial agency in, or no controul over" another Branch rather than a complete usurpation of power.

amined the doctrine of separation of powers and its particular expression in the Appointments Clause of the Constitution (Art. II, § 2, cl. 2). The Court held that any "significant governmental duty * * * pursuant to a public law" (424 U.S. at 141)—including the enforcement of the law through judicial proceedings, the promulgation of regulations, the issuance of advisory opinions interpreting the law, and the determination of the eligibility of individuals for benefits (424 U.S. at 138-141)—must be exercised by "Officers of the United States" appointed by the President or otherwise in conformity with the Appointments Clause; these duties, the Court held, cannot be carried out by officials appointed by Congress. *Ibid.*; see also *id.* at 125-126, 131; *id.* at 267-282 (opinion of White, J.).

In Section 244(c)(2), Congress has not merely authorized one of its Houses to appoint the officials who will in turn administer and enforce the law, as in the statutory provision this Court struck down in *Buckley* v. *Valeo*. Congress has taken the more extreme step of reserving such authority to the Senate and House of Representatives themselves. But as the Court explained in *Buckley*, "'[n]ot having the power of appointment, * * * the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection'" (424 U.S. at 139, quoting *Springer* v. *Philippine Islands*, *supra*, 277 U.S. at 202). It necessarily follows that Congress cannot engraft upon the offices of the Members of one of its Houses the Executive power to nullify the determination by the Attorney General that an alien is eligible for and deserving of relief under an Act of Congress and to require the Attorney General to make a different disposition of the case.[32]

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[32] Although this case involves a legislative veto of an order issued in an administrative *adjudication*, a legislative veto of an order issued in a rule-making proceeding is equally violative of the doctrine of separation of powers. The Court made clear in *Buckley* that the promulgation of regulations pursuant to a previously en-

This conclusion is strengthened by the Incompatibility Clause of the Constitution (Art I, § 6, cl. 2). See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 124. That Clause provides that "no Person holding any Office under the United States"—which includes all those who "exercis[e] significant authority pursuant to the laws of the United States" (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 126)—"shall be a Member of either House during his Continuance in Office." We doubt that even the Senate and House of Representatives would deny that their Members "exercis[e] significant authority *pursuant to* the laws of the United States" when they vote on a resolution of disapproval pursuant to Section 244(c)(2) of the Immigration and Nationality Act.[33]

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acted law must be undertaken by Officers of the United States appointed by the President, not by officials appointed by Congress. 424 U.S. at 140. It necessarily follows that Congress itself cannot overrule the promulgation of a regulation by an Officer of the United States pursuant to authority granted by an Act of Congress without passing a *law* amending that Act.

Nor does Congress' inability to overrule a decision of an Officer of the United States without passing a law depend on whether that Officer may be removed by the President at will or is, instead, a member of an "independent agency" who is insulated from such removal in the absence of cause. Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 132-133, 141. In either case, if Congress reserved the authority to veto decisions of the Officer, it would possess the power both to make the law and participate in its execution—the very concentration of powers the Framers sought to prevent. And, of course, compliance with the Presentation Clauses is particularly crucial with respect to congressional action having the effect of a law when it pertains to independent agencies, because the President does not have an alternative means of protecting the public interest from improvident measures by exercising control over the day-to-day affairs of those agencies.

[33] The House of Representatives (Br. 21) and Senate (Br. 28) seek to distinguish *Buckley* v. *Valeo* on the ground that it was concerned only with legislative encroachment upon the appointment power expressly conferred upon the President by the Appointments Clause. This contention misapprehends the thrust of *Buckley*. The Court viewed that Clause not as an isolated technicality that never-

"The decision in *Buckley* v. *Valeo* also forecloses the argument of the House of Representatives (Br. 34-39) and Senate (Br. 31-32) that the validity of Section 244(c)(2) is supported by Congress' plenary power over immigration and by its power under the Necessary and Proper Clause. In *Buckley*, the Court observed that "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction," and the Court saw "no reason to believe that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend well-established constitutional restrictions stemming from the separation of powers" (424 U.S. at 132). Although Congress' power over immigration concededly is broad, it likewise is not of such a "wholly different *nature*" (emphasis added) that Congress itself may participate in the execution of

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theless had to be enforced by the courts (cf. 424 U.S. at 125-126), but as a particular manifestation of the fundamental doctrine of separation of powers woven into the Constitution (*id.* at 124-131). Indeed, the Court repeatedly linked Congress' inability to appoint Officers of the United States to perform significant duties under a law with Congress' inability to perform such functions itself. 424 U.S. at 135, 137, 139, 141. The Court held that Congress could appoint officers only in connection with the conduct of its own internal affairs (*id.* at 127-128; cf. *id.* at 133-134), in aid of its legislative function through investigation (*id.* at 137-138, 139, 141), or in the dissemination of information, removed from the administration of the laws (*id.* at 137). It is significant that the functions in connection with which Congress can appoint its own officers are those that do *not* constitute the exercise of Congress' "legislative Powers," in the sense of giving binding instructions to the Executive Branch or regulating the affairs of private persons (see pages 38-39, *supra*). To exercise such "legislative Powers," Congress must make a *law*, which would, in turn, be administered by "Officers of the United States." This demonstrates the interrelationship between the argument made in Point A that Section 244(c)(2) is invalid because it does not comport with the requirements for making a new law, and the argument herein that Section 244(c)(2) does not comport with the separation of powers doctrine as regards the execution of a previously enacted law.

laws pertaining to aliens. See also cases cited at page 47, *supra*.

Similarly, the Court observed in *Buckley* v. *Valeo* that "Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I." 424 U.S. at 135. Nor, because of the doctrine of separation of powers expressed in the Appointments Clause, could Congress vest in itself the authority to appoint Officers of the United States to serve as members of the Federal Election Commission. *Ibid.* So here, Congress cannot authorize one of its Houses to participate in the execution of the law merely because it believes that such participation would be "necessary and proper." The court of appeals made the same point, noting that the Necessary and Proper Clause "authorizes Congress to 'make all *laws*', not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional *form* in the exercise of the power" (J.S. App. 56a; emphasis added).

The Senate (Br. 28, 31, 32, 34) and House of Representatives (Br. 23, 26, 27, 33) rely extensively upon this Court's decision in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), in arguing that Section 244(c)(2) is constitutional. But that case involved a situation in which Congress, by enacting *legislation*, regulated the custody of materials in the Executive Branch and the manner in which decisions regarding those materials would be made, while assigning to an Officer of the United States appointed by the President the responsibility to administer the law. *Id.* at 441, 443-445; see *id.* at 498 (opinion of Powell, J.) ("This is not a case in which the Legislative Branch has exceeded its enumerated powers by assuming a function reserved to the Executive under Art. II"). That decision therefore is fully consistent with *Buckley* v. *Valeo* and in no way supports Congress' vesting in itself or one of its Houses the authority to veto orders or regulations issued under

an existing statute. See *id.* at 500 n.4 (opinion of Powell, J.) (noting that this issue was not before the Court).

3. *Section 244(c)(2) Cannot Be Sustained on the Novel Theory That the Executive is a Mere Agent of Congress*

Finally, the House of Representatives argues (Br. 25, 28, 32-33, 35-39) that the cancellation of deportation and granting of permanent resident status constitute the exercise of "legislative power," even when Congress has committed these functions to the Executive, and, therefore, that an Executive officer "who receives some part of the legislative power through the sweep of the Necessary and Proper Clause does not exercise that power by virtue of the Executive power to execute the laws of the United States" (Br. 37). Accordingly, the argument proceeds, Congress may retain and exercise itself a portion of this "legislative power"—here, the authority to make the final decision regarding the alien's deportation if the Attorney General rules in the alien's favor—rather than "delegating" this function to the Executive. In this view, " 'the executive officer merely acts as an agent of the legislative branch' " (Br. 37, quoting *Atkins* v. *United States*, 556 F.2d 1028, 1068 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)), and Congress therefore may attach any conditions it wishes to a grant of authority pursuant to that agency relationship. What is more, the House makes clear (Br. 26, 37) that its argument applies to *all* assertions of legislative power, except in those limited situations in which the Executive also has inherent constitutional authority over the subject matter. This proposition, which reduces the Executive from its status as a co-equal Branch to a mere pawn of the legislature, is as erroneous as it is audacious.[34]

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[34] The Senate suggests (Br. 28-29) that Section 244(c)(2) actually augments rather than infringes upon Executive power because it grants to the Executive an ability to suspend deportations

First, contrary to the House's contention, an Officer of the Executive Branch who performs duties pursuant to an Act of Congress does not exercise "legislative power." Legislative power is the power to make laws, not to carry them into effect. This Court reaffirmed in *Buckley* that the Framers' "'vesting of the executive power in the President was essentially a grant of the power to execute the laws'" (424 U.S. at 135, quoting *Myers* v. *United States*, *supra*, 272 U.S. at 117; see also 272 U.S. at 163-164). Thus, the authority to administer the laws is granted to the Executive by the Constitution, not by Congress, although obviously the Executive power does not attach in a particular area until Congress has passed the law that the Executive will administer.

Second, the Executive is not a mere agent of the Legislative Branch, as the House of Representatives suggests; he is an agent of the *law*. The President's constitutional duty is to "take Care that the Laws be faithfully executed" (Art. II, § 3), not to execute the wishes of Con-

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that it did not possess prior to 1940. This argument misapprehends the nature of the doctrine of separation of powers. The violation of that doctrine in this case derives from the effect Section 244(c)(2) has on the manner in which the Branches exercise their respective powers, not on whether Congress has given the Executive a greater or lesser number of things to do. For example, the statutes imposing non-judicial functions on Article III courts (see *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123, citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852)) were not saved from invalidity because they assigned to the Judicial Branch functions it did not previously perform. Moreover, the doctrine of separation of powers is violated in this case not only by the infringement of the Executive's powers, but also by the corresponding concentration of powers in the hands of the Legislative Branch.

The Senate suggests (Br. 30) that if the Attorney General believes that the legislative veto mechanism in Section 244(c)(2) is unconstitutional, he may simply decline to grant suspensions of deportation. We do not believe, however, that such total disregard of the evident congressional intent that relief be available in meritorious cases would be consistent with the Attorney General's obligation faithfully to administer the Act.

gress in whatever manner they may be expressed. As Hamilton wrote:

> To what purpose separate the executive, or the judiciary, from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be merely nominal and incapable of producing the ends for which it was established. *It is one thing to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government.*

The Federalist No. 71, *supra*, at 483 (emphasis added). The independence of the Executive from the Legislative Branch is evident as well in the Framers' provision for the selection of the President by an independent body of electors, from which Senators and Representatives are expressly excluded. Art. II, § 1, cls. 2 and 3; Twelfth Amendment; see *The Federalist* No. 51 (J. Madison), at 348; *The Federalist* No. 68, *supra*, at 457-461; see also Art. II, § 1, cl. 7.[35]

Contrary to the Senate's apparent suggestion (Br. 12 n.12), Congress can derive no support for the validity of the legislative veto from the cases sustaining the authority of Congress to make the application of a law conditional upon a finding by the Executive that the factors requisite for its application are present (see *Field* v. *Clark*, *supra*) or upon a vote by private persons expressing a desire to be covered by the statute (see, *e.g.*, *Currin* v. *Wallace*, 306 U.S. 1, 15-16 (1939)). The Court in *Currin* expressly rejected the contention that the power vested in agricultural producers in a particular district to decide by referendum whether to take advantage of the protection of a federal law (just as voters in a local

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[35] Even if the Executive is viewed in some sense as an "agent" of the Legislative Branch in carrying out congressional policies, that agency relationship is one firmly established by the Constitution. Under that document, Congress may convey binding instructions to its "agent" in the Executive Branch only in the form of a duly enacted *law*.

community might elect to organize under a home rule statute passed by the state legislature) constitutes "legislative power" that the Constitution vests in Congress. The Court stated that the "'[legislative] power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of the legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.'" 306 U.S. at 16, quoting *Hampton & Co.* v. *United States, supra*, 276 U.S. at 407.[36]

C. If Section 244(c)(2) Were Held Constitutional, It Would Appear That Congress Could Pass General Legislation Authorizing One or Both of Its Houses to Veto Any Decision or Order of the President or Other Officer of the United States

Section 244(c)(2) authorizes one House of Congress to overrule an adjudicatory decision of an Officer of the Executive Branch and effectively to direct the final disposition of the matter. If that section were held to be constitutional, it would appear that Congress could pass legislation authorizing one of its Houses to veto virtually every decision or order of the President or other Officer

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[36] The statutory requirement involved in *Currin*, that a group of private persons affirmatively vote by a two-thirds majority to be covered by an Act of Congress, is no different in principle from Congress' provision in the Social Security Act that the payment of benefits is conditioned upon the individual beneficiary's filing of an application for benefits. See 42 U.S.C. 402(g)(1)(D); *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981). It does not follow from the fact that Congress may make benefits under an Act of Congress dependent upon the initiative of private persons that Congress itself may exercise the authority under that Act to determine who will and who will not receive benefits, without passing an amending law. Put another way, the fact that Congress may impose certain conditions on the receipt of benefits under a law does not suggest that Congress may impose the *unconstitutional* condition that the Executive's determination of eligibility for benefits be subject to veto by one or both Houses of Congress. See Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 596 (1953).

of the United States in the execution of a law passed by Congress. The President "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands." *The Federalist* No. 73, *supra*, at 494. This would effectively vest the "*whole* power" of the Executive Branch in one House of the Legislative Branch, and thereby "[subvert] the fundamental principles of a free constitution" (*Nixon* v. *Administrator of General Services*, *supra*, 433 U.S. at 442 n.5), quoting *The Federalist* No. 47, *supra*, at 325-326 (emphasis in original)). It would, at the same time, fundamentally alter the constitutionally prescribed means of exercising legislative power, by bringing about a wholesale evasion of the requirements of bicameral approval and presentation to the President.

Statutory provisions authorizing one House of Congress to overrule determinations made pursuant to law by those charged with administering the law are of relatively recent origin, dating principally from a provision in a reorganization statute passed in 1932 (Act of June 30, 1932, ch. 314, 47 Stat. 382). See Dixon, *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. Rev. 423, 426-427 (1978). Except for a number of measures adopted during World War II, virtually all of the "legislative veto" provisions have been enacted within the last decade.[37] Such devices therefore

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[37] See H.R. Doc. No. 95-357, 95th Cong., 2d Sess. 1 (1978) (noting that at least 48 legislative veto provisions were enacted during the four years prior to 1978, more than had been enacted during the preceding 20 years); Watson, *supra*, 63 Calif. L. Rev. at 1089-1094. These provisions have been enacted despite the view of the current and previous Administrations that various forms of congressional control of executive action, short of duly enacted legislation, are unconstitutional. See Presidential statements collected at J.S. 22 n.19; Watson, *supra*, 63 Calif. L. Rev. at 988 nn. 9 & 10. The effort by the Senate (Br. 9-17, 33-34) to convey the impression of Executive acquiescence in legislative veto provisions

cannot be thought to be essential to the effective working of the form of government established by the Constitution. Indeed, the Judiciary Committees of the Senate and House of Representatives both proposed during the 96th

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therefore is clearly misleading. See also *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140 n.176.

The Senate cites (Br. 33-34) the opinion of Attorney General Bell (43 Op. Att'y Gen. No. 10 (1977)) concluding that the one-House veto provision in the reorganization statute, 5 U.S.C. 906(a), is constitutional. But that opinion emphasized that its conclusion was limited to the context of reorganization plans and did not extend, for example, to congressional vetoes of Executive actions in on-going programs, such as that involved here. 43 Op. Att'y Gen. No. 10, *supra*, at 4. Moreover, in reaching the conclusion that Congress may take action outside the normal legislative process, that opinion relied (*id.* at 2) principally on a statute passed in 1789 (Act of Sept. 2, 1789, ch. XII, Section 2, 1 Stat. 65-66) providing that either House of Congress could require the Secretary of the Treasury to make reports and furnish information. But either House of Congress would have the inherent power to require such information in appropriate circumstances without the need for an authorizing statute (see note 25 *supra*), and a resolution making such a demand therefore does not constitute the exercise of legislative powers, for which the Constitution requires the concurrence of both Houses and presentation to the President. This was the view of the Senate Judiciary Committee in its 1897 report. S. Rep. No. 1335 *supra*, at 8-9. We therefore must take a view contrary to that of Attorney General Bell, with respect to both the precedential effect of the 1789 statute (see also Watson *supra*, 63 Calif. L. Rev. at 997 n.49) and the validity of the legislative veto device even in the limited context of reorganization plans. Compare 37 Op. Att'y Gen. 56, 63-64 (1933); 83 Cong. Rec. 4487 (1938).

The opinion of Attorney General Cushing (6 Op. Att'y Gen. 680, 683 (1854)), also cited by the Senate (Br. 33 n.53), likewise referred only to the 1789 statute authorizing either House to require the Secretary of the Treasury to furnish information, and noted that "in practice, the same duty is imposed on other Heads of Department" (6 Op. Att'y Gen. *supra*, at 683). Finally, the 1949 Department of Justice memorandum on a legislative veto device, cited by the Senate (Br. 33), also arose in the particular context of a proposed reorganization act. The memorandum characterized the provision as being in the nature of a contract between the President and Congress under which the President personally undertook to put no reorganization plan into effect if Congress disapproved it. S. Rep. No. 232, 81st Cong., 1st Sess. 20 (1949); see Watson, *supra*, 63 Calif. L. Rev. at 1014 n.143.

Congress that the legislative veto provision in Section 244(c)(2) be repealed. See pages 64-65 *infra*.

Congress has ample other means at its disposal by which it can control the actions of the Executive Branch. It can enact detailed statutory criteria to be applied by the Executive. It can repeal or amend a law when it believes the Executive has interpreted it improperly, or limit "the duration of laws so as to require renewal instead of repeal" (2 M. Farrand, *supra*, at 587 (remarks of James Madison)). Indeed, the Constitution itself contains a model for such a limitation. See Art. I, § 8, cl. 12 (no appropriation of money to raise and support Armies "shall be for a longer Term than two Years"). Congress or one of its Houses also can pass a resolution expressing its views on matters within the Executive's domain, which, in appropriate circumstances, no doubt would carry significant political, although not binding legal, force. Jackson, *supra*, 66 Harv. L. Rev. at 1355. Congressional oversight through hearings and investigations can have a similar effect.

Congress might well find it more expeditious in certain circumstances to exert its will on the people by some means other than the enactment of laws. The Framers anticipated and accepted, however, that the constitutional requirements that proposed legislation receive the concurrence of both Houses and be presented to the President for his approval or disapproval might prove inconvenient on occasion. Madison foresaw with respect to bicameralism, for example, that "as the facility and excess of lawmaking seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation." *The Federalist* No. 62, *supra*, at 47. And at all events, as Justice Brandeis observed in his dissenting opinion in *Myers* v. *United States*, *supra*, "the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable

friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." 272 U.S. at 293.

D. The One-House Veto Provision in Section 244(c)(2) Is Severable From the Remainder of Section 244

If the Court holds unconstitutional the one-House veto provision in Section 244(c)(2), that provision properly may be severed from the remainder of Section 244.[38]

It is firmly established that, in the absence of compelling evidence to the contrary, the Court will presume that Congress intends the unconstitutional portion of a statute to be severed from the remainder. " 'The cardinal principle of statutory construction is to save and not to destroy'." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The invalid portions of a statute are to be severed " '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not' " (*Buckley* v. *Valeo*, *supra*, 424 U.S. at 108, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932).

Moreover, the Immigration and Nationality Act contains a "strong severability clause" (*Califano* v. *Westcott*, 443 U.S. 76, 90 & n.8 (1979)). Section 406 of the Act, 8 U.S.C. 1101 note, provides:

> If any particular provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the applica-

[38] The question of severability is, of course, one of statutory interpretation. A finding of severability in this case therefore will not control the interpretation of the other statutes containing legislative veto provisions cited by the Senate. Br. 33 n.52, 39-48. And because of the severability issue turns on *congressional* intent, a holding that the legislative veto provision in Section 244(c)(2) is severable quite clearly would not authorize the Executive to "execute a law by disobeying it," as the House suggests (Br. 25), or "create an imperial Executive, possessing absolute and uncontrollable power to execute congressional laws as it sees fit" (*ibid.*).

tion of such provisions to other persons or circumstances shall not be affected thereby.

This clause greatly enhances the presumption of severability. See, *e.g.*, *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

The House and Senate appear to argue that this presumption is overcome here because Congress consistently has incorporated some form of legislative veto provision into the grant of authority to the Executive Branch to suspend deportations.[39] But the mere fact that Congress

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[39] The House and Senate also suggest that Section 244 is so "tightly integrated" (House Br. 49; see Senate Br. 24-25) that the legislative veto provision cannot be excised without impermissibly distorting the legislative scheme. See, *e.g.*, *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973). This suggestion is plainly incorrect. In the first place, this argument is dependent upon the fiction advanced by the House and Senate that Congress affirmatively *approves* suspensions of deportation under Section 244(c)(2) by *inaction* (see House Br. 49; Senate Br. 24-25 & n.39). We have explained above why this characterization of the statutory scheme is erroneous. See pages 40-44, *supra*. Moreover, if resolutions passed by a single House are held by this Court to lack binding effect, the administrative mechanism of Section 244 will be "fully operative as a law" (*Champlin Refining Co.* v. *Corporation Commission*, *supra*, 286 U.S. at 234); indeed, it will function in precisely the way it has functioned until now in the overwhelming majority of cases (see pages 62 and 64, *infra*)—those in which neither House of Congress has passed a resolution disapproving the suspension. Thus, if the one-House veto device in Section 244(c)(2) is held invalid, suspensions would continue to be reported to Congress, pursuant to Section 244(c)(1), and deportation proceedings would be cancelled when the period specified in Section 244(c)(2) expires. During the period the report was before Congress (and later), Congress would retain the power to pass a *law*, in accordance with the requirements of Article I, requiring the alien's deportation, subject to whatever restraints may be imposed by the Bill of Attainder Clause, Art. I, § 9.

Nor is it significant that the legislative veto provision is contained in Section 244(c)(2) instead of in an independent Section or Subsection (see House Br. 49; Seniate Br. 24-25). The severability clause of the Act does not refer to "sections" or "subsections"; it refers to the excision only of "any particular *provision*" or, in-

included the unconstitutional legislative veto device in the statute obviously does not resolve the question of severability; if it did, no unconstitutional provision ever would be severed. The question of severability depends on what Congress *would* have done *if* it had recognized that legislative veto provisions are unconstitutional and therefore could not properly be included in the statute. See *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Specifically, the question is whether, in those circumstances, Congress would have chosen to grant administrative authority to the Attorney General to suspend deportations, or instead would have chosen to deal with each individual case by considering a private bill. The House and Senate identify nothing in the legislative history suggesting that Congress would have preferred the latter course. To the contrary, the legislative history of Section 244(c)(2) reflects a deliberate decision by Congress to *reject* private bills as a means of granting relief to deportable aliens covered by that Section.

Congress first authorized the Secretary of Labor to suspend deportations in the Alien Registration Act of 1940, ch. 439, Section 20, 54 Stat. 671. That Act specified that an alien was nonetheless to be deported if both Houses of Congress, by concurrent resolution, disapproved the suspension. Between 1940 and 1948, over 23,000 deportations were suspended (see S. Rep. No. 1515, 81st Cong., 2d Sess. 599 (1950)), and apparently none was disapproved by concurrent resolution (see S. Rep. No. 1204, 80th Cong., 2d Sess. 3 (1948)).

In 1948, Congress amended the law to provide that a suspension of deportation would not take effect unless both Houses of Congress affirmatively voted by concurrent resolution to approve it. Act of July 1, 1948, ch. 783, 62 Stat. 1206. This requirement of affirmative approval by both Houses was, of course, essentially as burdensome for Congress as a regime under which

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deed, of "any * * * *application* [of a provision] to any person or circumstance * * *" (emphasis added) that is held unconstitutional.

Congress would have to pass private bills in order to grant relief.

Within months, this new system proved unacceptable. Accordingly, in 1949, the House Judiciary Committee proposed the measure that ultimately was enacted as the one-House veto provision in Section 244(c)(2). The Committee explained that it was specifically rejecting the approach adopted in the 1948 Act (H.R. Rep. No. 362, 81st Cong., 1st Sess. 2 (1949)):

> In the light of experience of the last several months, the committee came to the conclusion that the requirement of affirmative action by both Houses of the Congress in many thousands of individual cases which are submitted by the Attorney General every year, is not workable and places upon the Congress and particularly on the Committee on the Judiciary responsibilities which it cannot assume. The new responsibilities placed upon the Committee on the Judiciary under the [1948 amendment] are of purely administrative nature and they seriously interfere with the legislative work of the Committee on the Judiciary and would, in time, interfere with the legislative work of the House.

The committee's proposal was incorporated into the comprehensive reform of the immigration laws that was then underway and that culminated in the Immigration and Nationality Act of 1952. See S. Rep. No. 1515, *supra*, at 1, 609-611.

Thus, in enacting the legislative veto provision that came to be included in Section 244(c)(2), Congress not only explicitly rejected a system comparable to that of relying on private bills; it chose instead an approach that it knew from its earlier experience between 1940 and 1948 would result in the Executive Branch's suspension of deportation becoming final in all but exceptional cases. See, *e.g.*, S. Rep. No. 1204, *supra*, at 3-4. Consequently, there is no basis for concluding that, if a legislative veto provision had been unavailable, the Congress that enacted Section 244(c)(2) would have chosen to rely on private bills instead of allowing the Executive to suspend and

cancel deportations and grant permanent resident status. This conclusion is especially compelling when that Section is contrasted to Section 244(c)(3), under which Congress has retained affirmative control over cancellation of deportation and the granting of permanent resident status by requiring the approval of both Houses of Congress by concurrent resolution.

Moreover, since 1953, the Attorney General has suspended deportation in well over 5,700 cases, and the suspension has been disapproved by one House of Congress in only 229 instances (Senate Br. 20 n.34, 40). Since 1977, over 1200 deportations have been suspended, and only two of those were disapproved (Senate Br. 49). This experience strongly suggests that Congress, if it were unable to resort to the legislative veto option, would choose to enact private bills in the small percentage of cases in which it disagreed with the Attorney General's decision, rather than in the overwhelming number of cases in which it did not disagree. Indeed, in 1980, as part of a series of amendments to the immigration laws, both the Senate and House Judiciary Committees reported bills that would have repealed the legislative veto provision of Section 244(c)(2). S. Rep. No. 96-859, 96th Cong., 2d Sess. 15, 30 (1980); H.R. Rep. No. 96-1301, 96th Cong., 2d Sess. 32, 78 (1980). The House Committee explained (H.R. Rep. No. 96-1301, *supra*, at 32):

> The principal purpose of this amendment is to reduce INS paperwork. * * * Further, it will relieve Congress of the burden of reviewing sketchy and inadequate reports on suspension cases and processing legislation to approve or disapprove them. It should be noted that the cases have already been adjudicated by Immigration Judges and in some cases the Board of Immigration Appeals, following a review of the entire record of these cases.

While these proposals did not come to a vote on the floor (see 126 Cong. Rec. H11422 (daily ed. Dec. 1, 1980))—perhaps because Congress was aware that this litigation was pending (see H.R. Rep. No. 96-1301, *supra*, at 32)—nothing in their history suggests that Congress was op-

posed to the views of its committees having jurisdiction over immigration matters, much less that it would have preferred instead to *abolish* the administrative mechanism that has afforded relief to hundreds of aliens each year and revert to a regime under which relief could be granted only by private bill.

II. THE SENATE AND HOUSE OF REPRESENTATIVES' JURISDICTIONAL AND RELATED ARGUMENTS FOR AVOIDING A DECISION ON THE CONSTITUTIONAL ISSUE ARE WITHOUT MERIT

The Senate and House of Representatives have spread before the Court a plethora of jurisdictional and other issues that they assert would avoid a decision of the one-House veto question. None of these points is correct or should be permitted to divert the Court's attention from the merits of the important separation of powers issue that is properly presented in this case and ripe for resolution.

A. The Court Of Appeals Had Jurisdiction Of The Case Under Section 106(a) Of The Act

The House of Representatives (Br. 42-44) and Senate (Br. 21-23) contend that the court of appeals did not have statutory jurisdiction on Chadha's petition for review under Section 106(a) of the Act to consider his constitutional challenge to the one-House veto provision in Section 244(c)(2). This contention is without merit, because the validity of Chadha's order of deportation was entirely dependent on the constitutionality of the one-House veto.

1. *Chadha Challenged A Final Order Of Deportation Entered In A Deportation Proceeding Under Section 242(b) Of The Act*

a. The record makes clear that the final order of deportation was entered against Chadha at the conclusion of the administrative deportation proceedings pursuant to Section 242(b) of the Act *solely* because of the resolu-

tion of disapproval passed by the House of Representatives, and pursuant to the statutory command that the Attorney General "shall" deport the alien upon the passage of such a resolution (J.S. App. 70a-71a; J.A. 50-53; see pages 5-6 *supra*). In the court of appeals, Chadha challenged the validity of the final order of deportation on the ground that the statutory provision (Section 244 (c) (2)) that mandated its entry is unconstitutional. Such an action plainly is encompassed by the terms of Section 106(a), which grants exclusive jurisdiction to the courts of appeals of actions seeking "judicial review of final orders of deportation * * * made against aliens within the United States pursuant to administrative proceedings under [Section 242(b)]."

b. The Court's decision in *Foti* v. *INS*, 375 U.S. 217 (1963), also compels this conclusion. In *Foti*, the Court held that the courts of appeals have exclusive jurisdiction under Section 106(a) to review an order by the special inquiry officer (the immigration judge) denying an alien's application for suspension of deportation. There, as here, governing regulations provided for the consideration of applications for suspension of deportation together with questions of deportability in a single proceeding under Section 242(b), "resulting in one final order of deportation" (375 U.S. at 223). The Court observed that Congress was aware of this practice and had it in mind when it enacted Section 106(a). 375 U.S. at 223-224. The Court also reasoned that permitting review of a denial of suspension of deportation in a proceeding under Section 106(a) is consistent with the "plain objective" of that Section " 'to create a single, separate, statutory form of judicial review of administrative orders for the deportation . . . of aliens.' " (375 U.S. at 225, quoting H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22 (1961)). In contrast, the Court concluded, this purpose would be frustrated by a bifurcated procedure resulting from the alien's seeking review of the adjudication of his deportability in the court of appeals and review of a denial of suspension of deportation in a separate proceeding in the

district court (375 U.S. at 225-227, 232). This reasoning applies with equal force here.

The House of Representatives argues (Br. 42-43), however, that the court of appeals did not have jurisdiction under Section 106(a) because Chadha conceded his deportability. From this, the House asserts (Br. 42) that "[t]he validity or propriety of Chadha's deportation order has never been in issue" and "was in no way dependent upon or related to the House resolution under Section 244(c)(2) disapproving a cancellation of that deportation order." The House's argument confuses a finding of deportability with a lawful order of deportation. Although Chadha does not challenge the immigration judge's finding that he was deportable for overstaying his visa, he manifestly does challenge the validity of the order requiring him to be deported from the United States. The Court in *Foti* made clear that the court of of appeals' jurisdiction on a petition for review is not limited to questions of deportability,[40] as the House suggests, but rather encompasses as well the denial of a suspension of deportation that is merged into the deportation order. 375 U.S. at 227-228.

c. For similar reasons, the House also errs in relying (Br. 43) on this Court's decision in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968). In that case, after an order of deportation was entered against the alien by the special inquiry officer in deportation proceedings under Section 242(b), the alien applied to the District Director for a stay of the execution of that order pursuant to regulations authorizing the Director to grant such a stay to an alien "under a final administrative order of deportation" (392 U.S. at 209). When the application was denied, the alien sought review in the court of appeals.

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[40] The fact that Chadha conceded his deportability does not distinguish this case from *Foti*. The alien in *Foti* also conceded his deportability (375 U.S. at 218, 220), as did 80% of all aliens at the time (*id.* at 227 n.13).

This Court held that the court of appeals did not have jurisdiction under Section 106(a) to review the District Director's denial of a stay.

This case presents a materially different situation. As the Court observed in *Cheng Fan Kwok*, the application for a stay of deportation in that case "assumed the prior existence of an order of deportation," and the alien therefore "did not 'attack the deportation order itself but instead [sought] relief [*i.e.*, a stay of the execution of the order] not inconsistent with it' " (392 U.S. at 213, quoting *Mui* v. *Esperdy*, 371 F.2d 772, 777 (2d Cir. 1966)). In the present case, in contrast, Chadha's application for suspension of deportation preceded in time—and therefore did not "assume[] the prior existence of"—the order of deportation. Here, unlike the alien in *Cheng Fan Kwok*, Chadha *does* attack the deportation order itself. And the relief he seeks—cancellation of deportation—is wholly inconsistent with the existence of a valid deportation order: as the Court observed in *Foti*, "[s]ignificantly, when suspension is granted, no deportation order is rendered at all, even if the alien is in fact found to be deportable" (375 U.S. at 223). Finally, here, as in *Foti*, the order denying suspension and requiring Chadha's deportation was entered by the immigration judge responsible for conducting the administrative deportation proceedings under Section 242(b) of the Act, to which Section 106(a) expressly refers. See also *Giova* v. *Rosenberg*, 379 U.S. 18 (1964). The order denying the stay of deportation in *Cheng Fan Kwok*, on the other hand, was made "in proceedings entirely distinct from those conducted under § 242(b), by an officer [the District Director] other than the special inquiry officer who, as required by § 242(b), presided over the deportation proceeding" (392 U.S. at 213).[41]

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[41] Thus, as two commentators have observed, this Court's decisions in *Foti* and *Cheng Fan Kwok* have drawn "a bright line between decisions of immigration judges, reviewable only by courts of appeals, and decisions of district directors, reviewable only by

2. *Cases Raising Constitutional Issues Are Not Excepted From The "Exclusive" Jurisdiction Of The Courts of Appeals Under Section 106(a)*

a. The Senate contends (Br. 21-22), however, that jurisdiction under Section 106(a) does not encompass petitions seeking review of deportation orders on constitutional grounds and that Chadha therefore should have brought his constitutional challenge in the district court. See also House Br. 44. This contention is inconsistent with the plain language of Section 106(a), which provides that a petition for review in the court of appeals is the "*exclusive* procedure for judicial review of final orders of deportation" (emphasis added). Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 588-589 (1980). Nothing in the legislative history of Section 106(a) suggests that its all-inclusive language does not mean exactly what it says. To the contrary, the result urged by the Senate, under which non-constitutional challenges to a deportation order would be brought in the court of appeals and constitutional challenges to the same order

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district courts." Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 35 (1975). Under this test, the court of appeals clearly had jurisdiction in this case.

The Senate suggests (Br. 21) that the court of appeals did not have jurisdiction because congressional review takes place outside of the administrative proceedings under Section 242(b). But Chadha does not take issue with the House's expression of disapproval, standing alone. Rather, he challenges the order of deportation that was required by Section 244(c)(2) to be entered in the Section 242(b) proceedings in response to the House resolution. For purposes of jurisdiction under Section 106(a), it does not matter whether the immigration judge concluded that suspension of deportation must be denied because the alien did not satisfy the statutory eligibility criteria, as in *Foti*, or because of the one-House veto, as here. Cf. *Unification Church* v. *Attorney General*, 581 F.2d 870, 877 (D.C. Cir.), cert. denied, 439 U.S. 828 (1978). Moreover, in either event, the courts of appeals have jurisdiction to consider "all determinations made during *and incident to* the administrative proceeding" under Section 242(b)." *Foti* v. *INS*, *supra*, 375 U.S. at 229 (emphasis added).

would be brought in a separate proceeding in the district court, would lead to the very bifurcation of review, proliferation of litigation, and delay in the deportation process that Congress sought to avoid in creating " 'a single, separate, statutory form of judicial review' " in the court of appeals. *Foti* v. *INS*, *supra*, 375 U.S. at 225, quoting H.R. Rep. No. 1086, *supra*, at 22; cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980).[42] Indeed, the aliens whose repetitive litigation was cited in the legislative history[43] as the most notorious examples of the particular practices Congress sought to curb had raised constitutional challenges to the Act and procedures followed under it (see *Marcello* v. *Bonds*, 349 U.S. 302, 304 (1955); *Heikkila* v. *Barber*, 345 U.S. 229, 230 (1953); see also *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50 (1955)), and the House report specifically referred to suits presenting "attacks upon the constitutionality of the Immigration and Nationality Act" (H.R. Rep. No. 1086, *supra*, at 23) as being among the proliferation of suits that were to be concentrated in the courts of appeals.

The leading commentators agree that Congress did not intend implicitly to except constitutional challenges to deportation orders from the "exclusive" grant of jurisdiction to the courts of appeals under Section 106(a). See 2 C. Gordon & H. Rosenfield, *Immigration Law and*

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[42] The Senate (Br. 22-23) and House of Representatives (Br. 43 n.32) suggest that it is inappropriate for a court of appeals to consider constitutional questions on a petition for review because the administrative record might not be framed to that end. This argument is particularly misplaced in this case, for no party has suggested that additional evidence is required in order to resolve the constitutional issues presented. In other cases under Section 106(a) raising constitutional issues, if the record does not contain sufficient evidence on which to resolve the constitutional issue, the court of appeals could remand to the immigration judge to receive additional evidence. 28 U.S.C. 2347(c); *FTC* v. *Standard Oil Co.*, *supra*, 449 U.S. at 244-245.

[43] H.R. Rep. No. 423, 86th Cong., 1st Sess. 9 (1959); H.R. Rep No. 565, 87th Cong., 1st Sess. 11 (1961); H.R. Rep. No. 1086, *supra*, at 32-33.

Procedure § 8.9Ab, at 8-74 (rev. ed. 1981) ("review by the Court of Appeals under [Section 106(a)] includes consideration of any constitutional challenges which would void the deportation order"). See also *Unification Church* v. *Attorney General*, 581 F.2d 870, 877 (D.C. Cir.), cert. denied, 439 U.S. 828 (1978); *Pilapil* v. *INS*, 424 F.2d 6 (10th Cir.), cert. denied, 400 U.S. 908 (1970); *Riva* v. *Attorney General*, 377 F. Supp. 1286 (D.D.C. 1974) (three-judge court). This result also is consistent with the practice of considering constitutional claims under other statutes providing for direct review in the courts of appeals. See, *e.g.*, *CBS* v. *FCC*, No. 80-207 (July 1, 1981), slip op. 7, 24-27; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442 (1977).

b. The only support the House and Senate have been able to muster for the contrary position is language in the Third Circuit's recent decision in *Dastmalchi* v. *INS*, 660 F.2d 880 (1981). The Third Circuit reached the correct result in *Dastmalchi*, but for the wrong reason. Disagreeing with the reasoning of the Ninth Circuit in the decision below, the Third Circuit concluded that it was without jurisdiction on a petition for review of a deportation order under Section 106(a) to consider constitutional challenges to an INS regulation that the court erroneously believed underlay the deportation order.[44]

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[44] In *Dastmalchi*, Iranian aliens who had entered the United States on non-immigrant student visas challenged an INS regulation (8 C.F.R. 214.5) that required them to report to the District Director of INS during the Iranian crisis. They also challenged discretionary decisions of the District Director, after they reported as required, declining to overlook assertedly "minor" or "technical" violations of their student status and to restore them to lawful student status. Implementation of the reporting requirement and the District Director's decisions challenged in *Dastmalchi* occurred entirely outside of the administrative deportation proceedings under Section 242(b). The final order of deportation was entered on the basis of the evidence of deportability adduced at the Section 242(b) hearing itself; contrary to the Third Circuit's apparent assumption, the validity of that order therefore was unaffected by whether the aliens should have been required to report to the District Director under the challenged regulation or

In the court's view, because an immigration judge does not rule on the constitutionality of statutes and regulations in the course of administrative proceedings under Section 242(b), a court should not do so on a petition for review under Section 106(a). 660 F.2d at 886-890. However, this Court has rejected the argument that a special statutory provision for judicial review of agency decisions is inapplicable in the case of a constitutional challenge to the governing statute or regulations, even though that challenge would not be considered at the administrative level. See *Weinberger* v. *Salfi*, 422 U.S. 749, 760-762, 764 (1975); cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 329-330 (1976). And as we have explained above, the plain language and legislative history of Section 106(a) clearly refute the Third Circuit's statutory construction.

c. Even if the Court were to conclude, contrary to our submission above, that the court of appeals did not have jurisdiction under Section 106(a), this Court nevertheless is free to decide the constitutional question presented by the one-House veto on the INS's appeal under 28 U.S.C. 1252 in No. 80-1832. See note 1 *supra*. There is no reason for the Court to refrain from doing so and instead to remit Chadha to an action in the district court. The constitutional issue is one of continuing and fundamental importance and presents solely a question of law that has been fully addressed by the court below and by the parties in this Court.

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should have been granted discretionary relief before deportation proceedings were commenced (cf. 660 F.2d at 890 n.24). Moreover, the challenged discretionary decisions were those of the District Director, as in *Cheng Fan Kwok*, not orders of the immigration judge, as in *Foti* and the instant case. For these reasons, the aliens should have brought their challenge in the district court, as other Iranian aliens did. See *Narenji* v. *Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979), rev'd, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980).

B. There Has Been No Absence of a Case or Controversy Because of a Supposed Lack of Adverseness

The House of Representatives argues (Br. 46-47) that there was an absence of "concrete adverseness" in the proceedings on Chadha's petition for review in the court of appeals.[45] This contention is clearly mistaken, as the court below held (J.S. App. 22a-24a) and as we have explained more fully in our reply brief (at 11-14) in response to the motions to dismiss the INS's appeal in No. 80-1832. See also Chadha Br. 20-23. The Attorney General fully intended to enforce the deportation order issued by the immigration judge unless that order was set aside by the courts.

The House of Representatives' principal contention on the adverseness issue appears to be that this was a "feigned" suit between Chadha and the INS. See, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S.

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[45] The House of Representatives also questions (Br. 44-46) Chadha's standing to challenge the constitutionality of Section 244(c)(2). Like the court of appeals (J.S. App. 12a), we find this attack on Chadha's standing somewhat "odd." Chadha has been ordered deported solely because of the resolution of disapproval passed by the House of Representatives pursuant to Section 244(c)(2). See pages 5-6, *supra*. Thus, contrary to the House's contention (Br. 45), Chadha beyond question can trace his threatened deportation directly to the operation of Section 244(c)(2) and the actions taken by the House and the immigration judge pursuant to that Section. He is not, as the House argues, simply asserting the interests of a third party (the Executive Branch) in a separation of powers dispute with Congress or an abstract interest common to all members of the public. This Court held in *Buckley* v. *Valeo*, *supra*, that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." 424 U.S. at 117.

Equally unpersuasive is the suggestion by the House of Representatives (Br. 48) that the separation of powers issue in this case presents a non-justiciable political question. "This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 123.

47 (1971). The House is quite wrong. The immigration judge (in entering the order of deportation) and the Board of Immigration Appeals (in sustaining the order) acted under the compulsion of Section 244(c)(2) and adhered to the established practice of many agencies of declining to rule on constitutional challenges to the statute they are charged with administering, properly leaving such issues to the courts (J.S. App. 71a, 73a; J.A. 49, 52-56). See, *e.g.*, *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764; *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). Thus, this case is no more "feigned" than was *United States* v. *Lovett*, *supra*, where the Executive agencies concerned stopped paying the employees' salaries as required by the appropriations rider, but where the Executive agreed with the employees, when they filed suit in the Court of Caims to recover the salaries the agencies had withheld, that the rider was unconstitutional. In *Lovett*, as here, because the Executive supported the argument that the statute was unconstitutional, the defense of the statute was undertaken by Congress itself.

C. There Is No Basis For Withholding A Judgment On the Constitutional Issue Because of An Asserted Unavailability of Relief to Chadha

The Senate (Br. 27-28) and House of Representatives (Br. 49-50) argue that because, in their view, the one-House veto provision in Section 244(c)(2) cannot be severed from the remainder of Section 244, the entire Section must fall if the legislative veto provision is unconstitutional, and Chadha's deportation therefore cannot be cancelled and his status cannot be adjusted under that Section in any event. From this premise, they argue that Chadha should not even be permitted to challenge the constitutionality of Section 244(c)(2), because he would not obtain relief from deportation and permanent resident status as a result of a favorable ruling. It is a sufficient answer to this argument that the one-House veto provision in Section 244(c)(2) clearly *is* severable. See pages 60-65 *supra*. But in addition, this Court has

often held that a party may raise a constitutional claim even if the challenged provision ultimately may not be severable in a way that would entitle the claimant to relief. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 272 (1979); *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975); *Califano* v. *Westcott*, *supra*, 443 U.S. at 89-91; *id.* at 93-96 (opinion of Powell, J.) (reaching constitutional question while arguing that claimant was not entitled to relief).

The Senate itself acknowledges (Br. 27) that under its approach, no person would be permitted to challenge the constitutionality of Section 244(c)(2); yet Section 244 would remain in effect, allowing some aliens to have their deportation cancelled and their status adjusted, while denying this relief to Chadha and others whose suspensions are disapproved—even if the one-House veto provision that requires this result is unconstitutional. Congress thereby could continue to invoke an unconstitutional procedure without ever having to choose between the only constitutionally permissible alternatives available to it—relying on private bills or permitting Executive Branch determinations to become final in the absence of a duly enacted law overturning them. Moreover, the reasoning of the Senate and House is not limited to Section 244; following their logic, a legislature could insulate *any* unconstitutional aspect of a benefit program from challenge simply by specifying that the constitutionally dubious aspect is not severable from the remainder of the program.[46]

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[46] *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978), the only case cited by the House and Senate, lends no support to their contention. That case involved a challenge to 2 U.S.C. (1970 ed.) 359(1)(B), which provided that one House of Congress could veto pay increases for certain Executive Branch officials after they were proposed by the President. The Senate had disapproved all the pay increases proposed in 1974 (S. Res. 293, 93d Cong., 2d Sess. (1974); 120 Cong Rec. 5508 (1974); S. Rep. No. 93-701, 93d Cong., 2d Sess. (1974)), and an official sued. The court ruled that Section 359(1)(B) was not severable from the provisions permitting the pay increases and therefore denied plaintiff monetary relief without reaching the constitutional question. 559 F.2d at 1261-1262. The court also declined to grant declaratory relief, but it expressly noted that it was doing

D. There Are No Grounds For Remanding the Case to the INS

Finally, the Senate suggests (Br. 17-21) that the Court should not decide the constitutional question because Chadha might have an alternative avenue of relief, in light of the passage of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102) and Chadha's marriage to a United States citizen during that same year. As the Senate concedes (Br. 19), however, neither event renders this case moot. Moreover, as explained in the Brief of Appellee-Respondent Chadha (Br. 25-26), a remand is not warranted for further exploration of these issues by the INS, because neither Chadha's marriage nor the Refugee Act would form the basis for relief equivalent to that to which Chadha is entitled under the court of appeals' decision. The Ninth Circuit's ruling makes Chadha immediately eligible for citizenship. In contrast, if he were forced to forgo the benefit of the judgment below and instead to pursue the courses suggested by the Senate, he would be eligible for citizenship only at some point several years in the future (even assuming that he first would be granted permanent resident status by pursuing those courses). See J.S. App. 17a-18a n.6.

The Senate argues (Br. 20) that the substantial effect of the decision below on the date on which Chadha is eligible for citizenship should be disregarded by this Court because Chadha sought review in the court of appeals only of a deportation order and because he might at least receive relief from *deportation* on remand. This argument is unavailing. As explained above (see pages 65-67 *supra*), and as this Court held in *Foti* v. *INS*, *supra*, the court of appeals' jurisdiction on a petition for review of a deportation order encompasses the issue of suspension of deportation under Section 244 as well as

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so in large part because the challenged one-House veto provision in Section 359(1)(B) had been repealed while the appeal was pending and a declaratory judgment therefore would serve no useful purpose. 559 F.2d at 1263.

deportation as such. Under Section 244(c)(2) and (d), a grant of suspension of deportation automatically leads to a grant of permanent resident status if the suspension is not lawfully disapproved by Congress. Thus, the date on which Chadha may acquire permanent resident status is intimately bound up with the issues raised in the petition for review. It would make no sense at this late stage in the proceedings to deprive Chadha of the benefit of the judgment below and to force him to relitigate the date on which he acquired permanent resident status (and, therefore, the constitutionality of the one-House veto provision in Section 244(c)(2) of the Act) in the course of the consideration of his petition for naturalization under 8 U.S.C. 1421(a) and 1427(e).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions Involved:

1. Article 1, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 7, Clauses 2 and 3, of the United States Constitution provide:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him,

the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

3. Article I, Section 8, of the United States Constitution provides in pertinent part:

The Congress shall have Power * * *

* * * * *

To establish an uniform Rule of Naturalization, * * *

* * * * *

—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

4. Article II, Section 1, of the United States Constitution provides in pertinent part:

The executive Power shall be vested in a President of the United States of America.

5. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed, * * *.

Statutory Provisions Involved:

1. Section 106(a) of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1105a (a), provides in pertinent part:

§ 1105a. *Judicial review of orders of deportation and exclusion*

(*a*) *Exclusiveness of procedure*

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [Section 242(b) of the Act] or comparable provisions of any prior Act * * *

2. Section 244 of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1254, provides in pertinent part:

§ 1254. Suspension of deportation

(a) Adjustment of status for permanent residence; contents

As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent

residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(b) Continuous physical presence not required because of honorable service in Armed Forces and presence upon entry into service

The requirement of continuous physical presence in the United States specified in paragraphs 1 and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable conditions, and (B) at the time of his enlistment or induction was in the United States.

(c) Fulfillment of requirements of subsection (a); report to Congress

(1) Upon application by an alien who is found by the Attorney General to meet the requirements of subsection (a) of this section the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first day of each calendar month in which Congress is in session.

(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of

Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

(3) In the case of an alien specified in paragraph (2) of subsection (a) of this section —

if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

(d) Record of cancellation of deportation

Upon the cancellation of deportation in the case of any alien under this section, the Attor-

ney General shall record the alien's lawful admission for permanent residence as of the date of cancellation of deportation of such alien is made, and unless the alien is an immediate relative within the meaning of section 1151(b) of this title, the Secretary of State shall reduce by one the number of nonpreference immigrant visas authorized to be issued under section 1153(a)(8) of this title for the fiscal year then current.

3. Section 406 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 note, provides:

> If any particular provision of this Act [this chapter], or the application thereof to any person or circumstance, is held invalid, the remainder of the Act [this chapter] and the application of such provision to other persons or circumstances shall not be affected thereby.

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Nos. 80-1832, 80-2170 and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NO. 80-1832 AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN NOS. 80-2170 AND 80-2171

SUPPLEMENTAL BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE

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Pursuant to Rule 35.5 of the Rules of this Court, the Solicitor General, on behalf of appellant-respondent Immigration and Naturalization Service, files this supplemental brief to inform the Court of the decision of the United

States Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, Nos. 80-2184 and 80-2312 (Jan. 29, 1982). In that case, the court of appeals held that the one-House veto provision in Section 202(c) of the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. IV) 3342(c), is unconstitutional because it violates the Article I requirements of bicameral approval and presentation to the President of measures having the force of law and because it violates the doctrine of separation of powers. The court therefore held that a resolution of disapproval passed by the House of Representatives could not be given effect to invalidate an incremental pricing regulation promulgated by FERC in connection with the deregulation of natural gas.

At page 40, footnote 85 of its opinion, the court of appeals cites the decision of the district court in *Pacific Legal Foundation* v. *Watt*, No. CV-81-141-BLG (D. Mont. Jan. 12, 1982).[1] That case involves a challenge to a Public Land Order withdrawing certain lands in wilderness areas from disposition under laws pertaining to mineral leasing. The Secretary of the Interior issued the Order following the passage of a resolution by the Committee on Interior and Insular Affairs of the United States House of Representatives pursuant to Section 204(e) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(e), which provides that the Secretary shall withdraw lands from disposition when the appropriate committee of the Senate or House of Representatives notifies him that an emergency exists and that extraordinary measures must be taken to preserve values that otherwise would be lost. The

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[1]The district court's initial opinion in *Pacific Legal Foundation* v. *Watt* was rendered on December 16, 1981. The district court issued an amended opinion in the case on January 12, 1982, and entered judgment on January 18, 1982.

district court concluded that if Section 204(e) were interpreted to authorize the committee to dictate the scope and duration of an emergency withdrawal, it would be unconstitutional under the Ninth Circuit's decision in the instant case. However, the district court construed Section 204(e) to permit the Secretary to revoke the order of withdrawal after a reasonable period, following submission of reports to the committees of Congress. The district court believed that this construction avoided the constitutional issue, even though its decision requires the Executive to take affirmative action based upon a resolution adopted by a single congressional committee. Slip op. 37-38. On January 27, 1982, the Secretary filed a motion for clarification and reconsideration of the district court's decision.

For the convenience of the Court, we are lodging with the Clerk of this Court 10 copies of the D.C. Circuit's opinion in *Consumer Energy Council of America* v. *FERC* and the district court's opinion in *Pacific Legal Foundation* v. *Watt*, as amended on January 12, 1982.

Respectfully submitted.

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Nos. 80-1832, 80-2170, 80-2171

IN THE

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October Term, 1981

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ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE-RESPONDENT JAGDISH RAI CHADHA

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE, *Appellant,*
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ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE-RESPONDENT JAGDISH RAI CHADHA

STATEMENT OF THE CASE

A. Statement of Facts

Appellee-respondent Jagdish Rai Chadha was born in Kenya in 1944 and was raised and received his basic education there (J.A. 33).[1] In 1963 Kenya became independent from Great Britain, and all residents were then given an opportunity to apply for Kenyan citizenship (J.A. 13). Chadha applied but received no answer to his written re-

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[1]References to the Joint Appendix will be cited as "J.A. ____"; references to the Appendix to the Jurisdictional Statement will be cited as "App. ____".

quests. The reason for this was that, although Chadha was a native of Kenya, he was of East Indian extraction, and the racial tensions between the Asians and the Africans in Kenya at that time were high and continued to be so at the time of the proceedings giving rise to this case (*id.*).

The absence of a response by the Kenyan authorities to his requests to become a citizen created an acute problem when Chadha decided to come to the United States to continue his education. He thus went to the appropriate offices and was advised that he should obtain a United Kingdom passport. He did so, which enabled him to depart Kenya and to stay in Great Britain for 12 days prior to entering the United States under a student visa on September 16, 1966 (J.A. 13, 33). His visa was subsequently extended until June 30, 1972, and he remained in the United States during his entire extension except for a one week visit to Montreal in September 1967 (J.A. 9-10). During those six years, Chadha obtained a B.S. in business administration and an M.A. in political science and economics from Bowling Green University in Ohio (J.A. 12). Upon completion of his education, he found that as a result of the racial situation he could not return to Kenya, let alone find a job commensurate with his education (J.A. 12-15, 44-45). He also learned that, while there was some question about whether he could enter Great Britain, there was no question that there would be a considerable delay and a highly uncertain job status there, both for legal and racial reasons (J.A. 14-16, 37-39, 44-45).

At that point Chadha decided to remain in the United States and look for work, eventually moving to California in an attempt to find appropriate employment (J.A. 24). At each step he found that his opportunities were barred due to his immigration status. Therefore, he went to the Los Angeles office of the Immigration and Naturalization

Service (INS) in the summer of 1973 to attempt to obtain the proper papers. However, the officials there immediately noted that his visa had expired and thereupon seized his passport and began steps to deport him (J.A. 24-25).

A hearing was held on January 11, 1974, before an Immigration Judge. Chadha conceded that he was deportable (J.A. 10) but was given an adjournment to apply for suspension of deportation and adjustment of his status to that of a permanent resident alien under section 244(a)(1) of the Immigration and Nationality Act of 1952 ("INA"), 8 U.S.C. § 1254(a)(1) (J.A. 19). That statute permits an illegal alien who has been a continuous resident of the United States for seven years, who is of good moral character, and whose deportation would cause him to suffer "extreme hardship," to become a permanent resident. Both in his application (J.A. 33-46) and at the adjourned hearing of February 7 (J.A. 23-32), Chadha based his hardship claim on his inability to return to Kenya, the only place that he had ever lived before coming to the United States, and on serious questions about when or even whether he could go to England, and once there, whether he could find appropriate employment, particularly given the racial attitudes towards Asians in Great Britain. Although initially inclined to deny the request (J.A. 30), the Immigration Judge ultimately determined that, unlike the thousands of others making similar requests each year, Chadha had demonstrated that his was a case of extreme hardship (J.A. 31).

Normally, an administrative law judge's exercise of discretion to cancel an alien's deportation would end the matter. But, unlike the usual situation, the decision in favor of Chadha, while not appealable to any court, did not end the process. Under section 244 (c)(2) of the INA

either House of Congress is given the right to veto the decision of the INS to allow an adjustment of status, so long as the veto takes place during the session of Congress in which the report of the INS's decision is forwarded to it, or during the following session.[2]

Shortly after the INS's June 25, 1974 decision to cancel Chadha's deportation, a report was submitted to Congress. Nothing further took place until December 12, 1975, when the Chairman of the Subcommittee on Immigration, Citizenship and International Law of the House Judiciary Committee, Congressman Joshua Eilberg, introduced a resolution for the purpose of vetoing the decisions to cancel the deportation of Chadha and five other aliens. H.Res. 926, 94th Cong., 1st. Sess. (121 Cong. Rec. 40247). Four days later the Judiciary Committee was discharged from further consideration of the resolution, and the bill was brought to the floor without even being printed or made available to other members of the House. 121 Cong. Rec. 40800. The sole explanation for the resolution was presented by Congressman Eilberg. After repeating the requirements of the statute, he observed that it was "the feeling of the committee, after reviewing 340 cases, that the aliens contained in the resolution did not meet these statutory requirements, particularly as it relates to hardship; and it is the opinion of the committee that their deportation should not be suspended." *Id.* The resolution was then agreed to without a recorded vote. *Id.*

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[2]The order suspending Chadha's deportation stated that "if Congress takes no action adverse to the order granting suspension of deporation, the proceedings [shall] be cancelled and . . . appropriate action [shall] be taken pursuant to section 244(d) of the Immigration and Nationality Act, as amended" (J.A. 48).

As a result, the deportation proceeding against Chadha was reconvened on August 4, 1976, at which time he moved that it be terminated on the ground that the veto was unconstitutional (J.A. 49). Although expressing his agreement with Chadha that the veto appeared unconstitutional (J.A. 51), the Immigration Judge concluded that he possessed "no authority to decide the constitutionality of statutes" (J.A. 50), and therefore on November 8, 1976, entered an order directing Chadha's deportation (J.A. 52-54). That order was appealed to the Board of Immigration Appeals, and on February 11, 1977, it too concluded that it had no power to declare an act of Congress unconstitutional and thus affirmed the order of deportation (J.A. 55-56).

B. Proceedings in the Ninth Circuit

Following the affirmance of his deportation order, Chadha filed a petition for review in the Ninth Circuit pursuant to section 106(a) of the INA, 8 U.S.C. § 1105a(a), which provides that review in the court of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportation. . . made against aliens within the United States pursuant to administrative proceedings under section 1252 (b) of this title. . . ." There Chadha's brief renewed and amplified his constitutional challenges to the veto exercised by the House of Representatives. In its response the INS agreed with Chadha that the veto was unconstitutional, but insisted that it had no choice but to deport him in the absence of a court order to the contrary. With its brief, the INS filed a suggestion that the court invite the House and Senate to file *amicus* briefs on the constitutional question presented (J.A. 1), and on November 17, 1977, the Clerk of the Court wrote both the Senate and House inviting them to "file a brief *amicus*

curiae representing the view of [Congress] on the constitutionality of 8 U.S.C. § 1254(c)(2). . .," the provision authorizing the legislative veto.

That invitation was accepted. However, the principal thrust of both congressional briefs and of the presentations at the oral argument of April 10, 1978, was to try to persuade the court not to decide the constitutional issue on which they had been invited to express their views. Thus, *amici* questioned Chadha's standing, alleged a lack of adverseness, and raised the defense of political question. They also contended that the veto was not separable from the remainder of section 244, that Chadha would not benefit from a declaration of unconstitutionality, and therefore the court should not reach the merits. Finally, they even suggested that the case did not belong in the court of appeals but should have been filed in the district court.[3]

On the merits, the House and Senate argued, as they have done here, that there was no veto in fact, but simply a failure of both Houses to approve the INS's recommendation. Therefore, they contended, no constitutional issue, based on separation of powers or other grounds, was presented. To the extent that the basis of the power to veto in section 244(c)(2) was questioned, both Houses relied on the Necessary and Proper Clause, Article I, § 2, cl. 18 of the Constitution.

On August 10, 1980, more than two years after oral argument, Mr. Chadha married Theresa Lorentz, a U.S. citizen (App. 17a, n.6). As a result, he became eligible to

[3]That contention was raised in an off-handed manner at the end of the Statement of the Case in the House's brief (p. 24). The court nonetheless asked for supplemental briefs on the issue.

adjust his status to that of a permanent resident alien pursuant to 8 U.S.C. § 1151(b). That in turn would entitle him, at the expiration of three additional years, to become eligible to become a citizen pursuant to 8 U.S.C. § 1430(a). By memorandum dated November 26, 1980, he informed the court of his marriage and explained that the case was not moot because, even if he sought to take advantage of his change in marital status, a delay of at least three or four years would ensue before he would become eligible to become a citizen. On the other hand, he argued, the granting of the relief sought in this case would entitle him to become a citizen almost immediately pursuant to 8 U.S.C. § 1427(a) since more than five years had passed since the INS decision in June 1974 and nearly five years would have expired since the veto of December 16, 1975. veto of December 16, 1975.

Less than a month later, the court of appeals issued its ruling, cancelling the deportation order and striking down section 244(c)(2) as a violation of the doctrine of separation of powers. Before deciding that issue, the court carefully considered and then rejected each of the *amici*'s procedural arguments.

First, it addressed the jurisdictional question under section 1105a and concluded that the case belonged in the court of appeals. Since Chadha was directly challenging a deportation order, which in turn was based directly on the allegedly unconstitutional veto, the court ruled that it "blinks reality to hold, as amici urge, that such congressional action was not 'incident to' the [deportation] proceeding. . .," the test ennunciated by this Court for deciding jurisdictional questions under section 1105a (App.8a). The court also observed that if *amici*'s suggestion were adopted, Chadha would be relegated to a proceeding in a district court, producing a result that "would fly in the face of the explicit congressional intent 'to ex-

pedite the deportation of undesirable aliens by preventing successive dilatory appeals to various federal courts. . .," *citing Foti v. INS*, 375 U.S. 217, 226 (1963) (App. 9a). It further noted that the position of *amici* would result in a "waste of judicial resources and [that] the delay entailed by such a scheme [would] directly contradict Congress' intent to have one 'single, separate, statutory form of judicial review.' H.Rep. No. 565, 87th Cong., 1st Sess. 1 (1961)" (*id.*).

The court next turned to the three-pronged challenge to justiciability – standing, political question, and lack of adverseness. As to standing, the court dealt with each of the three alternative claims of the congressional *amici*. First, it rejected the argument based on the lack of severability of the relief provisions and the veto, finding that the House and Senate had not met their burden of establishing that it is "evident" that "Congress 'would not have enacted those provisions within its power' without the veto," *citing Champlin Refining Co. v. Corporation Comm'n.*, 286 U.S. 210, 234 (1932) (App. 14a). In so ruling, the court relied on the purpose of Congress in giving the Attorney General discretion – to relieve the burden on Congress of reviewing numerous private bills – and on a careful analysis of section 244. From these it concluded that the provisions for suspending and cancelling deportation in section 244(a) could operate independently of the veto in section 244(c)(2) (*id.*).

It then went on to reject *amici*'s next standing argument – that Chadha's claim was a generalized grievance "common to all citizens interested in separation of powers" – finding the statement to be true only in "a trivial sense" (App. 19a). The court concluded that Chadha's injury "stems directly from the operation of the statute he challenges" and that unless the court orders otherwise, the

Attorney General will deport him, thus making it clear that his claim is very different from that of the ordinary citizen (App. 20a). Finally, the court rejected the argument that only government officials, not individuals, can bring constitutional challenges based on separation of powers arguments because such a claim

> simply proves too much. If taken to its limit, no individual could ever challenge a congressional act using a separation of powers argument. Our constitutional history, however, is contrary (*id.*).

The court then disposed of *amici's* political question claim, noting that Chadha was not relying on the limits contained in either the Naturalization or the Necessary and Proper Clauses, but was basing his challenge on a violation of separation of powers. "As this doctrine is not textually committed to any one branch, the political question doctrine is not implicated" (App. 21a). The court also relied on a more fundamental reason for rejecting the political question doctrine: the rulings of this Court that "the political question doctrine is based on a judicial recognition of the principle of separation of powers" (App. 22a). The court then observed that it would "stand the political question doctrine on its head to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle" (*id.*).

Next, the court considered the claim of lack of adverseness. Initially, it observed that Chadha would be deported unless his claim is addressed and upheld (App. 23a). It next noted the fact that it had asked the Senate and House to appear as *amici* and that they had presented arguments supporting the constitutionality of the veto

(*id.*) Finally, it concluded that if it adopted the position of *amici*,

> we would implicitly approve the untenable result that all agencies could insulate unconstitutional orders and procedures from appellate review simply by agreeing that what they did was unconstitutional. Where, as here, the agency fully intends to enforce its order, it would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds (App 23a-24a).

On the merits, the court explored both the constitutional history and prior decisions on separation of powers in great detail, focusing on the principal purpose of the doctrine, which it found to be the prevention of "an unnecessary and therefore dangerous concentration of power in one branch" (App. 29a). Thereafter, it set forth its standard for a violation of the separation of powers principle: "an assumption by one branch of powers that are central or essential to the operation of a coordinate branch [where] the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government" (App. 37a). Next it meticulously examined the process by which decisions to cancel deportation under section 244 are made by the INS in order to measure the veto action of the House against what separation of powers permits and prohibits (App. 39a-46a).

The court then applied its test "by considering how one might view the impact of the disapproval on the scheme in functional terms" (App. 47a). It did so by analyzing the veto in terms of the three basic functions by which the federal government takes action: judicial, executive, and

legislative. It concluded that, viewed as either an attempt to construe the meaning of section 244, or as an attempt to share in the implementation of it, the House's veto was either a judicial or an executive function, both of which are specifically assigned to other branches under the Constitution (47a-55a).

That analysis meant that the veto could be upheld, if at all, only as part of the legislative function. The Senate and House sought to support the veto based on the Necessary and Proper Clause, but the court observed that the provision only "authorizes Congress to 'make all laws,' not to exercise power in any way it deems convenient. That a power is clearly committed to Congress does not sustain an unconstitutional form in the exercise of the power" (App 56a).

It then rejected the attempt to utilize that power in this case for two principal reasons. First, it concluded that the power to make laws "does not import authority to revise particular administrative dispositions. This is a case in which the greater power definitely does not include the lesser, because the exercise of the lesser power here entails the unnecessary disruption of the operation of the other two branches as we have outlined it above" (App. 58a-59a, footnote omitted). It then rejected *amici*'s attempt to analogize the effect of the one-House veto to the failure of one House to vote affirmatively on a private bill before it. It noted that the power to make laws has "important formal and procedural limitations," most importantly the requirement of concurrence by both Houses and the opportunity for Presidential disapproval (App. 59a). The court therefore rejected the view that the suspension order was a mere recommendation which could become law by the inaction of both Houses, finding that to be inconsistent with the procedures set forth in Article I (App. 60a).

In its conclusion, the court exposed the core of the difficulty with this and all other one-House vetoes:

> We cannot accept that definite, uniform, and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case. The defects of this procedure are aggravated by the unicameral aspect of the statutory mechanism and the deficiencies of that procedure preclude justifying congressional action as a separate and independent way of adjudicating the status of aliens outside the executive and judicial process (App. 62a).

Accordingly, the court deemed the decision by the INS to stay deportation to be final, cancelled the deportation proceedings, and directed the Attorney General to "cease and desist from taking any steps to deport this alien based upon the resolution enacted by the House of Representatives" (App. 63a).

SUMMARY OF ARGUMENT

Despite numerous procedural objections raised by the Congressional *amici,* the court of appeals correctly reached the merits of the constitutional question. The INS had made it clear that, unless a court order prevented it from

doing so, it would deport Chadha as a result of the House's veto of its decision to grant him hardship relief. Chadha's injury is therefore directly traceable to the actions of the House, and his interest is accordingly far different from others who are concerned generally about violations of separation of powers principles. The claim of the House and Senate that only representatives of one of the three branches of government can assert separation of powers claims is plainly in error, as evidenced by decisions of this Court such as *Myers v. United States,* 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).

The claims of political question and lack of adverseness fare no better. This is not a case in which there is "no law to apply" since this Court has regularly decided cases based on the limits imposed by the separation of powers doctrine. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168 (1881). Indeed, to decline to decide this case on grounds of political question would be a perversion of the doctrine since separation of powers principles were intended to prevent encroachment by one branch on another, and only the Judiciary can ensure that no such violation occurs.

As to the alleged lack of adverseness, to accept that position would preclude Chadha from having his day in court solely because the Attorney General agreed that the veto was unconstitutional. The fact that both original parties agreed on the constitutional issue is no bar to a judicial determination, as evidenced by decisions of this Court such as *Granville-Smith v. Granville-Smith,* 349 U.S. 1 (1955), and *United States v. Lovett,* 328 U.S. 303 (1946), in which the appointment of an *amicus* to brief the other side was sufficient to enable this Court to decide important constitutional questions. Because the Senate and House participated fully as *amici* in the Ninth Circuit and

are parties in this Court, the requisite adverseness exists to enable this Court to decide the constitutionality of the veto.

The court of appeals was also correct in finding that the veto provision was severable from the rest of section 244, although it should have followed the practice of this Court and decided the constitutional question before ruling on severability. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 108-109 (1976). The severability question is not whether Congress would have preferred to include the invalid provision, since the answer to that will always be "yes." Rather the issue here is whether Congress would have denied the Executive the power to make the final relief determinations under section 244 if it had known that the veto was unconstitutional.

The answer to that question is in the negative because of the practical problems presented by full congressional review and approval of thousands of alien hardship applications each year and the legislative history of the prior version of section 244, which included and then later rejected a plan requiring affirmative approval by two Houses. These two considerations demonstrate that Congress has not met its burden of showing that it is "evident" that it would not have granted the remainder of the powers under section 244 without the veto. *See Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932).

Turning to the merits, the court of appeals correctly concluded, based on the history of separation of powers and the cases construing it, that the veto runs counter to the principal purpose of the doctrine: to prevent one branch from intruding on the actions of another branch, except in those cases specified in the Constitution. Examining the exercise of the veto from a functional perspec-

tive, it is plain that the House overreached its authority by performing either executive or judicial acts in vetoing the relief granted to Chadha. Thus, the veto violates separation of powers if the House either concluded that the INS improperly exercised its discretion in granting relief to Chadha or misinterpreted its statutory mandate under section 244 in doing so.

The court also correctly ruled that the veto cannot be justified as a legislative act because Congress can act in a legislative capacity only with the concurrence of both Houses and the opportunity for a Presidential veto, with exceptions such as the right of the Senate to advise and consent on treaties and appointments. The existence of such explicit powers – which are in effect one-House vetoes over executive actions – strongly suggests that no similar power was intended to be granted by implication. *Myers v. United States, supra,* 272 U.S. at 121.

The principal defense raised by the Congress in this Court is that, in fact, no veto occurred, and thus no constitutional issue is presented. According to the Senate and House, all that happened was that the INS's recommendation to Congress to grant relief to Chadha failed because one House did not go along with it, just as countless other measures fail to pass when both Houses do not concur. But that is a wholly unrealistic view of how section 244 works, particularly since from 1948 to 1952 Congress did affirmatively approve all adjustments in status on hardship grounds, and did so by a concurrent resolution. Moreover, the predicate for that theory is that aliens who obtain relief under section 244 secure congressional approval by the silence of Congress. Once again, that approach is in conflict with the Constitution, which requires that Congress act by a vote of two Houses and an oppor-

tunity for a Presidential veto, not by the failure of both Houses to object within a given time.

There are three additional reasons why the veto is unconstitutional, which, although related to the premises underlying separation of powers, are analytically distinct from them. First, as the history of Article 1, § 7 makes clear, the Founding Fathers intended to give the President an opportunity to disapprove all actions of Congress having an impact on the public, not simply those designated as bills. Because virtually all vetoes have such an impact, and because a veto denies the President the opportunity granted him in Article I, § 7, the veto is invalid.

Second, the veto also transgresses one of the most important checks against arbitrary action – the doctrine of bicameralism – by allowing one House to act without any check imposed by the other. Again, the Constitution provides for specific instances in which unicameral action is proper, none of which is applicable here.

Finally, the veto must be set aside because section 244(c)(2) contains no standards for its exercise. It can be invoked for any reason or for no reason at all, and there is no judicial review of decisions to employ it. Because courts cannot control its exercise, the veto runs counter to the doctrine of undue delegation set forth in *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935). While that doctrine is not normally applied to Congress, the reason is that Congress generally acts only with the concurrence of both Houses and the President. But when only one of the three decisionmakers is involved, the normal checks and balances are lacking. Therefore, when one House is acting in a non-legislative capacity, as it was here, the standards applied should be those required when there

has been a delegation to an administrative agency, and those standards have not been met.

ARGUMENT

I. THIS COURT SHOULD DECIDE THE MERITS OF THE CONSTITUTIONALITY OF THE LEGISLATIVE VETO IN THIS CASE.

Despite 50 years of doubt over the constitutionality of the legislative veto, this Court has never addressed the issue. During that time every President since Herbert Hoover has opposed the veto on both pragmatic and constitutional grounds. In recent years, the frequency with which Congress has relied on the veto to control decisions of the Executive Branch has increased dramatically. Indeed, since 1970, Congress has passed more than 100 statutes, some no longer in effect, containing a variety of vetoes.[4]

Although the court of appeals unanimously found the veto provision of section 244(c)(2) unconstitutional, both the Senate and House have urged virtually every conceivable rationale on this Court and on the lower court in this and other cases to avoid a decision on the merits.[5] The reason for this reluctance is not hard to understand: as long as vetoes remain on the books, Congress can use, or threaten to use, them and thereby increase its power, or in most cases the power of one House, or even one committee, subcommittee, or committee chairman at the expense

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[4] *See generally* note 13, *infra*, and Addendum 1 to the Brief of the Senate.

[5] *See e.g., Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, Nos. 80-2184 and 80-2312. (D.C. Cir. *argued* Sept. 10, 1981).

of the other branches – precisely what the separation of powers principle was intended to prevent.[6] Therefore, when the House and Senate urge this Court to refrain from deciding the constitutional question, their motives are less to protect the Court from overstepping its bounds, than to protect the Congress from a ruling that would end the congressional usurpation of executive and judicial powers.

In their briefs, the Senate and House suggest a panoply of reasons for the Court not to decide the constitutional question, nearly all of which were presented to and rejected by the court of appeals. Accordingly, this brief will only summarize the basic arguments and respond to a few points not raised below.[7]

A. Standing

The argument that Chadha lacks standing is contained in the brief of the House of Representatives at pages 44-46 and is based on both the absence of injury from the veto and an allegedly insufficient nexus between the injury to Chadha and the constitutional violation. According to the House, Chadha suffered no injury due to any wrong committed by either the INS or the House, and he is little more than "a volunteer for the Executive Branch in asserting its separation of powers complaint against the Congress. . ." (Br. 45).

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[6]For a lucid statement of the threatened use of the veto to control executive action, see the dissenting opinion of former Congressman and now Circuit Judge MacKinnon in *Clark v. Valeo, supra,* 559 F.2d at 680-82.

[7]We adopt the argument made by the Solicitor General in his brief supporting the jurisdiction of the court of appeals under section 1105a, as well as the rationale adopted by the court below (App. 4a-11a). As to the severability defense raised, we believe it is not properly considered as a matter of standing, and therefore we deal with it in Point II, *infra.*

It is difficult to comprehend the basis for the claim that no injury was inflicted by the INS since the agency ordered Chadha deported for reasons which he alleges are unconstitutional. The fact that an agency of the Executive Branch is being sued for conduct over which it has no control is simply irrelevant, as evidenced by the myriad of actions against federal, state and local officials who do no more than carry out allegedly unconstitutional statutes. Indeed, despite the immunity for members of Congress contained in the Speech and Debate Clause of Article I, § 6, cl. 1, this Court has long allowed actions to proceed against employees of the legislative branch when the real grievances were against the members themselves. *See, e.g., Kilbourn v. Thompson,* 103 U.S. 168, 205 (1881); *Powell v. McCormack,* 395 U.S. 486, 503-506 (1969). Similarly, the House's contention that Chadha cannot be claiming injury based on anything the House has done since it "simply denied [his] plea for mercy, for relief from a concededly lawful order of deportation" (Br. 45), is nothing more than another way of arguing that there was no veto, but merely a failure to approve the INS's clemency recommendation. To the extent that the argument has any force, it is addressed to the merits of this case, and we will respond to it there.

In addition, Congress has asserted that Chadha lacks standing because the dispute is between the Executive and the Congress, and he has "no personal interest of his own" to vindicate in that battle (H. Br. 44). Under that theory, apparently only the INS could bring suit to test this veto, and if it chose not to do so, Chadha would be deported without his day in court, despite his claim that the deportation order is unconstitutional.[8]

[8] The suggestion that the Executive Branch is the proper plaintiff in such a lawsuit is contrary to the position taken by Congress when the Department of Justice sought to assert an independent claim in *Clark v. Valeo, supra,* 559 F.2d at 654-57.

The principal difficulty with this position is, as the Ninth Circuit observed, that "[o]ur constitutional history, however, is contrary" (App. 20a). Thus, this Court has passed on separation of powers claims brought by private parties without suggesting any problem of standing in such landmark cases as *Myers v. United States*, 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Moreover, in *Buckley v. Valeo*, 424 U.S. 1, 117 (1976), this Court specifically held that private parties have standing to challenge an act of Congress on separation of powers grounds. In addition, the requirement of a strict nexus between the right asserted and the alleged violation of a constitutional provision is applicable only in the area of taxpayer standing. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78-81 (1978). Furthermore, the nexus requirement has never been applied to anyone, like Chadha, whose injury was so clear and for whom the connection between the unconstitutional veto and his deportation was so direct. In sum, the doctrine of standing is no bar to the courtroom door in this case.

B. Adverseness

In its brief (46-47), the House claims that the court of appeals was powerless to grant Chadha any relief because the case was only a "friendly, non-adversary proceeding," since Chadha and the INS agreed that the veto was unconstitutional. It is undisputed that had the Attorney General defended the constitutionality of the veto, no problem of adverseness would exist. Yet, argues the Congress, because the Attorney General concluded that the veto is unconstitutional, not only was the court of appeals forbidden from ruling on the constitutional question, but it could do nothing to prevent the INS from deporting Chadha even though the INS has consistently stated that it

would do so absent a court order to the contrary. Moreover, according to the House, even the briefs and oral arguments presented by Congress in support of the statute are insufficient to supply the requisite adverseness, since if that were allowed, the federal courts would become subject to continuous requests for advisory opinions by friendly parties simply by "inviting someone to present adverse viewpoints" (Br. 47). Once again, the House's contentions are refuted by both its wholly unrealistic view of the purpose of the adverseness aspect of the "case or controversy" requirement of Article III, and by a number of decisions of this Court which decided important constitutional questions where the actual parties agreed on the outcome.

The rationale behind this requirement is "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962); *Flast v. Cohen,* 392 U.S. 83, 95-97 (1968). Due to the presence of the House and Senate both in this Court and in the court of appeals, there can be no doubt that the constitutionality of the veto is being defended by litigants with interests adverse to those of Chadha and the INS. Indeed, it is difficult to imagine who could better defend the intent of Congress and support section 244(c)(2) than its authors and those who will most benefit from its retention – the House and Senate. Moreover, even if Congress had declined the invitation of the court of appeals, the court would nonetheless have had the power at least to prevent Chadha's deportation, even if it might have chosen not to rule on the constitutional question. Surely, the agreement of the chief law enforcement official of the United States that the deportation was unconstitutional cannot have made Chadha's position *worse*

than if the Attorney General had supported the veto, yet that would be the effect of accepting the House's contention.[9]

Not only do common sense and the purpose of the adverseness requirement run counter to Congress' position, so do the decisions of this Court. Prominent among them is this Court's action in *Granville-Smith v. Granville-Smith,* 349 U.S. 1 (1955), which involved the question of whether the Virgin Islands courts had jurisdiction to enter a consented-to divorce decree. After both lower courts had dismissed the case because of substantial doubts about the domiciles of the parties, this Court granted review. However, there were no "parties" to present the other side of the issue, and accordingly the Court took steps to remedy the situation:

> In view of the lack of genuine adversary proceedings at any stage of this litigation, the outcome of which could have far-reaching consequences on domestic relations throughout the United States, the Court invited specially qualified counsel "to appear and present oral argument as amicus curiae in support of the judgment below." 348 U.S. 885.

349 U.S. at 4.

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[9]Carried to its logical extreme, the position urged by Congress would produce absurd results: there could never be a consent decree in federal courts because both sides would be in agreement; there could never be a confession of error, since jurisdiction would be instantaneously ousted; and no action could be brought to secure a money judgment if the defendant agreed that the debt was owed because there would be no "controversy" between the parties. Surely nothing in Article III compels any of those illogical outcomes.

Similary, in *United States v. Lovett,* 328 U.S. 303 (1946), the Department of Justice agreed with the individual plaintiffs that their rights under the Bill of Attainder Clause had been violated, and this Court, with the aid of congressional *amici,* considered the constitutional question on the merits and upheld the plaintiffs' claim. The court of appeals also cited further instances in which *amici* supplied the requisite adverseness to enable courts to decide important constitutional and statutory questions (App. 23a and n. 8). *See also* this Court's order of October 19, 1981, in *Brown v. Hartlage,* No. 80-1285, 50 U.S.L.W. 3300, appointing an *amicus* to defend the judgment below; *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 382-83 (1980); *Pasadena City Bd. of Educ. v. Spangler,* 427 U.S. 424, 430-31 (1976) (intervention of United States prevents mootness and allows court to decide constitutional question). *Compare Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47 (1971), and *Muskrat v. United States,* 219 U.S. 346 (1911) (collusive suits with no adverse parties). In sum, it would be, as the court of appeals recognized, "a perversion of the judicial process to dismiss the appeal" for want of adverseness (App. 23a-24a).

C. Political Question

The House's brief on political question (p. 48) is based on an assertion that the exercise of the power under the Naturalization and Necessary and Proper Clauses is "so completely committed to the political departments of government that challenges thereto can never rise above the 'political question' level." As with the prior arguments regarding standing and adverseness, this defense is without merit because of its misapplication in this case and the failure to take into account recent decisions of this

Court which refuse to apply the political question doctrine to deny injured parties the right to an adjudication.

If either of the constitutional provisions Congress relies on conferred anywhere near as wide a discretion as is suggested, no law would ever be declared unconstitutional under either of them. Yet Chief Justice Marshall in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 421 (1819), recognized that the Necessary and Proper Clause, the broader of the two, itself has limitations and cannot be utilized to take actions that are otherwise forbidden by the Constitution. That recognition was recently reaffirmed in *Buckley v. Valeo, supra,* where this Court, despite acknowledging the great powers that Congress has over federal elections, ruled that it could not violate principles of separation of powers in creating a federal agency to enforce those laws. *See* 424 U.S. at 131-32.

Indeed, a century ago in *Kilbourn v. Thompson, supra,* 103 U.S. at 192, 199-200, this Court recognized the need to be especially vigilant regarding alleged encroachments by the House of Representatives and therefore refused to allow the House to be the judge of the legality of its own conduct. Accordingly, to utilize the political question doctrine to deny review of the House's separation of powers violation would be both inappropriate and contrary to *Kilbourn.* Furthermore, regardless of what the rule may once have been regarding the political question doctrine, its applicability has been greatly diminished as a result of decisions such as *Baker v. Carr, supra,* 369 U.S. at 226-37; *Powell v. McCormack, supra,* 395 U.S. at 518-21, 548-49; *United States v. Nixon,* 418 U.S. 683, 693 (1974); and *Buckley v. Valeo, supra,* 424 U.S. at 123. Thus, as the court of appeals so aptly observed (App.

22a), refusal to decide this case based on the political question doctrine would "stand the . . . doctrine on its head . . . ."

D. Alleged Availability of Other Statutory Relief

In its brief (17-21), the Senate points to two events, both occurring shortly before the court of appeals issued its opinion, as reasons for this Court to decline to decide the constitutional question since, as result of them, Chadha may have alternative statutory relief available to him. We submit, however, that neither of those events – his marriage nor the passage of the Refugee Act of 1980 – should dissuade the Court from reaching the constitutional question. While we agree that courts ought not to decide constitutional questions when statutory grounds will grant a party full relief, that proposition has no relevance here because the relief suggested is not equivalent to that which a favorable judgment in this case would provide.

The relief awarded to persons found to qualify under section 244 includes first suspension and then cancellation of deportation, and ultimately adjustment of status to that of a permanent resident alien. As a result of both his marriage to a U.S. citizen in August 1980 and the passage of the Refugee Act of 1980, Chadha is apparently eligible for relief from deportation. If those were the only benefits that would flow from a favorable decision in this case, there might be some arguable basis for not reaching the constitutional issue.

However, affirmance of the decision below will mean much more to Chadha. He contends, and neither the INS nor either House disagrees, that if the veto is unconstitu-

tional and severable, his deportation should be cancelled as of either June 25, 1974, the date when the Immigration Judge issued his decision, or, at the latest, when the period for a congressional veto under section 244(c)(2) would have expired in late December 1975. In either case, his status would be retroactively adjusted to that of a permanent resident on one of those dates, and his five year waiting period to become a citizen under 8 U.S.C. § 1427(a) would have been completed no later than the end of 1980.

Accordingly, if Chadha prevails in this case, he will be immediately eligible to be a citizen. On the other hand, if he adjusts his status on account of his wife's citizenship, he must wait three years in addition to the year it is likely to take to change his current status. And under the Refugee Act he would fare no better, since that statute only assists an alien in avoiding deportation and does not eliminate the required waiting period prior to becoming a citizen. Thus, although the Senate brief asserts that "Chadha would receive a properly equivalent remedy if his status were adjusted as the spouse of a citizen or as a refugee" (Br. 20), that contention overlooks Chadha's right to adjust his status to that of a permanent resident alien no later than the end of 1975, which now makes him immediately eligible to become a U.S. citizen. The court of appeals correctly recognized the additional benefits that would flow to Chadha from prevailing in this case rather than seeking to adjust his status as a result of his marriage, and properly reached the merits of his constitutional claim.

II. THE UNCONSTITUTIONAL VETO PROVISIONS ARE SEVERABLE.

At the urging of the Senate and House, the court of appeals treated the issue of severability as part of the question of standing. Congress contended below, and urges

again in this Court, that because the veto in section 244(c)(2) is not severable from the rest of section 244, Chadha would gain nothing from litigating the constitutional question, and thus the Court should not decide it. Accordingly, it has argued that the severability issue should be decided before considering the merits.

In our view, the court below was in error in first ruling on severability because it departed from the practice this Court has consistently followed in deciding severability only after finding an act to be unconstitutional. *See, e.g., United States v. Jackson,* 390 U.S. 570, 585 (1968); *Buckley v. Valeo, supra,* 424 U.S. at 108-109. Although we urge the Court to address the merits before deciding severability, we will reverse that order in this brief because the history of section 244, which is included in this section to demonstrate why the veto provision is severable, is also relevant on the constitutional question.

The decisions of this Court have made the standard on the issue of severability clear: an unconstitutional provision is severable "unless it is evident . . ." that Congress intended the contrary. *See Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234 (1932), *cited with approval* in *Buckley v. Valeo, supra,* 424 U.S. at 108. Moreover, although not dispositive, the inclusion of a severability clause, such as that contained in section 406 of the INA, 8 U.S.C. § 1101 (1976) note, increases the burden that is placed on the party claiming lack of severability. *See United States v. Jackson, supra,* 390 U.S. at 585 n. 27.

The question to be asked about severability is not, as the Senate suggests in its argument heading in Point I of its brief, whether "CONGRESS INTENDED TO PRESERVE ITS

AUTHORITY OVER THE GRANT OF PERMANENT RESIDENCE TO DEPORTABLE ALIENS" (Br. 9). Of course it did, since Congress wrote the provision that reserved that authority to itself. Framing the question in that manner is particularly unhelpful since the power in question belongs to Congress, and only rarely will a political body willingly relinquish authority. The proper question, we submit, and the one which this Court has asked in such decisions as *Champlin Refining Co.* and *Buckley, supra,* is, what would Congress have done had it known that its veto provisions were unconstitutional and thus could not be included? Stated in terms of *Champlin,* it is anything but "evident" that Congress would have reverted to private bills, or recommendations by the Attorney General for approval by both Houses of Congress, given the volume of applications under section 244 that the INS receives each year.

The answer to the question of what Congress would have done had it known that the veto was unlawful can come only from clear legislative history or from the inherent unworkability of the statute without the unconstitutional provision. *See United States v. Jackson, supra.* As the court of appeals recognized (App 14a-16a), the relief provisions of section 244 can operate perfectly well without the veto by simply treating any veto which occurs as a nullity, and hence the equivalent of no veto at all. In such cases the final sentence in section 244(c)(2), which governs when no veto occurs, would become the operative provision, and full relief would be accorded the alien. In practice, the statute works this way for the vast majority of aliens every year who run the congressional gauntlet without stumbling on an unsympathetic House, as Chadha did here.

Thus, the only possible basis for a finding of lack of severability is the legislative history, but before turning to its specifics, one overall observation stands out. Perhaps the most remarkable feature of the history of section 244, including the three amendments after its enactment in 1940, is that, despite the assertion by the Senate in its brief three times in a space of three pages (24-26) that the veto is "indispensable," there is not a word in the legislative history to support the assertion that if Congress knew it could not have the veto, then it would have given the Executive no power at all to cancel the deportation and adjust the status of aliens suffering extreme hardship. In fact, as we shall now demonstrate, the contrary is far more likely to be the case based upon the history of these provisions.[10]

Prior to 1940, the only means by which an alien could have his or her status adjusted was through a private bill. That created enormous time pressures on Congress, as Congressman Dies pointed out in the debate on 1937 legislation that would have remedied this situation: "I am absolutely convinced as a result of what has occurred in this House that it is impossible to deal with the situation through special bills." 81 Cong. Rec. 5542 (1937). The first change came about in the Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 672. That provision permitted an alien who had shown good moral character over the five years prior to his application to adjust his status if he could show that deportation would cause "serious

[10] If recent performance is any indication, Congress hardly considers the use of the veto today to be "indispensable." As Addendum 2 to the Senate brief shows, there have only been 32 aliens (out of 1910) whose adjustment in status has been vetoed in the past ten years and only two (of 689) since 1977. We note that if the veto were held unconstitutional and not severable, it would call into question the status of the thousands of aliens who were granted relief since 1952 by the INS and who were not vetoed.

economic detriment to a citizen or a legally resident alien who is the spouse, parent, or minor child of such deportable alien." If that standard were met, then the alien could become a permanent resident as long as two Houses of Congress did not veto the Attorney General's determination during the session of Congress in which the report concerning the alien was sent to it.

The law was altered in several respects in 1948. Pub. L. No. 863, 62 Stat. 1206. In addition to the category of individuals who were previously eligible, Congress added a new group: those who had been in the United States for seven years and were present on the effective date of the amendment. For both groups, however, Congress changed the basis for congressional action from a two-House veto to a two-House affirmative approval and extended the approval time to the end of the next session following the one in which the report concerning the alien was submitted by the Attorney General.[11] The changes made in 1948 were typical of the amendments made between 1948 and 1962 in one respect, because they expanded the category of individuals who were eligible for relief. They were atypical in another, since they increased the congressional control by shifting from a two-House veto to a two-House approval.

The experiment with a two-House approval for all hardship cases (which was virtually the equivalent of private bills originating with the Attorney General) proved too much for the Congress, and as a result it was largely ended in 1952, when Congress enacted what is now section 244 as

[11]Perhaps because of the short time in which both Houses of Congress had to act under the earlier law, Congress did not veto any of the first 19,000 aliens whose adjustments were subject to disapproval under it between 1940 and 1947. *Regulating Powers of Attorney General To Suspend Deportation of Aliens,* Hearings Before the Subcommittee on Immigration and Naturalization, Committee on the Judiciary, House of Representatives 34 (April 21, 1947).

part of a major revision of the immigration laws. Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 214-16. The two-House approval mechanism was retained only for those aliens who had been in the United States for ten years and had good moral character, yet had nonetheless been either convicted of certain serious crimes, or were at one time subversives, had entered the country without proper papers, or had overstayed their visas. For all other categories of eligible aliens, the two-House approval mechanism was discarded and replaced with a one-House veto.

This 1952 Act was important in another respect since Congress added three new categories of eligibles with varying residence requirements of between five and seven years. In addition, the hardship requirement was changed so that it was no longer limited to "economic detriment", but it was tightened to require "exceptional and extremely unusual hardship." The 1952 amendments also made another important change. For the first time the hardship did not need to be that of relatives who were either citizens or permanent residents aliens. Relief was also available if the alien himself would suffer hardship. In short, the 1952 amendments made it easier for aliens to obtain relief because the categories of eligible aliens were broadened, and there was less congressional involvement in the process.

In 1962 both patterns continued. Pub. L. No. 87-885, 76 Stat. 1247. The former requirement of "exceptional and extremely unusual hardship" was softened to "extreme hardship." Many of the conditions were eliminated, and a uniform continuous residence period of seven years for almost all aliens was established. Many aliens, who formerly were required to obtain two-House approval, including those, like Chadha, who overstayed their visas, were moved into the one-House veto category. Finally,

there was a contraction of the group needing two-House approval, as that category was limited to certain groups of criminals and those deemed to be subversives.

The conclusion to be drawn from this history is clear: Congress tried the two-House approval for all eligible aliens and rejected it after a four-year experiment from 1948 to 1952. Indeed, it was only a year into that experiment that the House Judiciary Committee was already working on changes because, as the Senate brief described it (14), the two-House approval mechanism was "unworkable." Given the increase in Congressional workload since 1949, it seems apparent that a system which would require two-House approval for every alien who sought relief on hardship grounds would, if anything, be more "unworkable" now than it was when it was tried and discarded before. In the words of *Champlin Refining Co., supra,* as reaffirmed in *Buckley,* it is anything but "evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not. . . " 286 U.S. at 234. In *Buckley,* this Court struck down numerous provisions of the Federal Election Campaign Act, and even ruled that the Federal Election Commission which was established to police that Act was itself unconstitutionally established. Nonetheless, it found that the remaining provisions were severable. Similarly, the correct conclusion here is that the one-House veto in section 244(c)(2) is severable from the basic relief provisions in the remainder of section 244 because there is no reason to believe that Congress would have preferred to return to the days of the private bill if it knew that it could not retain the veto.[12]

[12]The Senate's concessions (Br. 27 & n.45) that its position would result in striking down the entire law, so that no alien could obtain relief in the future and that no one could challenge the constitutionality of section 244(c)(2), are further reasons for rejecting its severability argument.

III. THE VETO IS UNCONSTITUTIONAL.

Introduction

The American constitutional system is one of affirmative grants of power: each of the three coordinate branches is limited to those powers assigned to it. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). In Article I, the Constitution explicitly provides that the laws shall be made by the Congress, comprised of the Senate and House of Representatives, working in conjunction with the President. In Article II, the President is assigned all executive powers, including the mandate to "take Care that the Laws be faithfully executed." Article II, § 3. In Article III, the judiciary is delegated the power to decide "cases" and "controversies" arising under the laws of the United States.

Congress unquestionably has the power to legislate to control the entry of aliens into the United States under Article I, § 8, cl. 4. Just as clearly, Congress may choose, within broad limitations, the extent of discretion it wishes to delegate to the Executive in carrying out the laws passed by it. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). Indeed, the actual execution of such laws can be accomplished only by executive officers. *Buckley v. Valeo, supra*, 424 U.S. at 140. There are, however certain basic powers provided to each branch in the Constitution that cannot be transferred, by legislation or otherwise, to one of the other branches. *J. W. Hampton, Jr. & Co. v. United States, supra*, 276 U.S. at 406; *Springer v. Philippine Islands*, 277 U.S. 189, 201-202 (1928).

Congress through the Immigration and Nationality Act has comprehensively regulated the entry, conditions of stay, deportation, and naturalization of aliens. 8 U.S.C.

§ 1101 *et seq.* It has properly assigned the administration of that Act to the Attorney General, who delegated it to the INS. 8 C.F.R. §§ 3.1(b)(2) and 244.1 (1981). Certainly Congress may withdraw its delegation of powers or change the laws concerning immigration if both Houses of congress pass a bill and that bill is either signed by the President or enacted over his veto by a two-thirds majority of each House. Article I, § 7. However, in the provision challenged here – section 244(c)(2), 8 U.S.C. § 1254(c)(2) – Congress has chosen a different method of controlling executive action, a veto by either House acting alone. Nowhere in the Constitution is there an express grant, or even a recognition, of such a one-House congressional veto power. Indeed, the Constitution was almost a hundred and fifty years old before the Congress first enacted a statute containing such a provision. The question then is whether such a power may properly be exercised in light of other constitutional provisions, principally the doctrine of separation of powers.[13]

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[13]There are a large number of commentaries discussing the constitutional question. The most prominent are referred to by the court of appeals in notes 10 and 36 (App. 25a, 55a). A number of congressional hearings have also considered the topic, and all but the most recent hearings are referred to in those commentaries. *See also Studies on the Legislative Veto,* 96th Cong., 2d Sess. (1980) (prepared by the Congressional Research Service for the Subcommittee on Rules of the House of the House Rules Committee); *Sunset, Sunrise, and Related Measures,* Hearings Before the Subcommittee on the Legislative Process of the House Rules Committee, 96th Cong., 1st Sess. (1979); *Regulatory Reform and Congressional Review of Agency Rules,* Hearings Before the Subcommittee on Rules of the House Rules Committee, 96th Cong., 1st Sess. (1979) (3 volumes); *Oversight of the Federal Trade Commission,* Hearings Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess. (1979); App. 32a, note 16.

A. The Congressional Veto Violates the Constitutionality Required Separation of Powers.

The fundamental thrust of Chadha's challenge to the veto is that it violates what James Madison called the most "sacred" principle of our Constitution (1 Annals of Cong. 604), namely, "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo, supra*, 424 U.S. at 120. It is a principle that the court of appeals described as "vital for constitutional government" (App. 26a).

Thus, under our constitutional system, no one branch may legitimately perform the functions or control the performance of another branch unless there is an express constitutional exception – a check and balance – creating that interbranch blending of power. As this Court explained in *Kilbourn v. Thompson, supra*, 103 U.S. at 191, "[i]t is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other." Only in this way can the "accretion of dangerous power" by a single branch be avoided. *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 594 (Frankfurter, J., concurring).

1. The Constitutional History of the Principle of Separation of Powers Demonstrates That One Branch Cannot Perform the Functions or Control the Performance of Another.[14]

Very early at the Constitutional Convention, the Framers agreed to separate the new government into three distinct branches "consisting of a supreme Legislative Executive & Judiciary."[15] Yet a review of the constitutional debates discloses no discussion of the desirability of this division, because the Framers and their critics alike accepted the fundamental, unchallengeable principle that none of the three branches should be allowed to interfere with the functions assigned to the others. This can largely be attributed to the influence of Montesquieu's *The Spirit of the Laws* (1748), and the widespread acceptance of this principle in state constitutions. *See* J. Adams, *A Defense of the Constitutions of Government of the United States* (1787). The main thrust of Montesquieu's work was on the necessity of keeping the three branches of government distinct and separate.[16] He also argued that separation in

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[14]Since the court of appeals explored the history and purpose of the doctine of separation of powers at considerable length, we have chosen only to highlight those portions which seem most relevant.

[15]M. Farrand, *Records of the Federal Convention of 1787*, vol. 1, p. 35 (1966) (hereinafter cited as "Farrand"). Other frequently cited works will include Elliot's *Debates on the Federal Constitution*, J. Elliot, ed. 5 vols. (1836) (hereinafter cited as "Elliot"); and J. Madison, A. Hamilton, J. Jay, *The Federalist Papers* (1961 ed.) (hereinafter cited as "Federalist").

[16] When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Complete Works of Montesquieu, vol. I, 199 (London: 1977) (hereinafter "Montesquieu").

itself was insufficient to preserve the independence of the branches and that specific institutional checks were needed to balance the powers of one branch against those of the others:

> The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative . . .. Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

Montesquieu at 209.

Having agreed on the basic structure, the delegates debated what modifications were necessary to provide the appropriate checks and balances. By carefully specifying in the Constitution the exceptions to the general rule of separation of the branches, the Framers sought to check the excesses of each branch by balancing them with powers in the others. Their primary concern was that power not be created and controlled by the same hand.

Thus, two days after agreement was reached on the tripartite form of government, James Madison defined the scope of the executive authority when he moved "that a national Executive ought to be instituted with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature." I Farrand 67. The Committee of the Whole then struck the words ". . . and to execute such other powers not Legislative nor Judiciary in their nature as may

from time to time be delegated by the National Legislature," on the sole ground that "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.' " *Id.* As Madison stated in Federalist No. 48:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.

Although stylistic modifications were subsequently made in the remaining language, the Framers maintained their intent that once a power was assigned to the Executive, it became an executive function, and as such not subject to encroachment from any other branch. The result was, as this Court observed in a related context, the "sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935).

There is no doubt that the Framers wanted to prevent one branch from performing functions that were specifically assigned by the Constitution to the exclusive province of another branch in order to prevent, as the court below observed, a "dangerous concentration of power in one branch" (App. 29a). But this history demonstrates that they had a second purpose in mind. The Framers recognized that, although some activities might

be assigned by legislation to either of two branches, they concluded that, once that assignment was made, there should be no intermingling of performance, so that responsibility would be clear regardless of which branch was assigned the duty. Thus, under the first prong of separation of powers, there would be a violation if, for example, Congress attempted to undertake the job of locating, taking custody, and seeing to the deportation of aliens who were alleged to be unlawfully in this country (an executive function) or sought to pass judgment on whether the INS had properly interpreted the standard for deportability in a given case (a role assigned to the Judiciary). Under the second branch of the separation of powers doctrine, a violation would occur if, for instance, Congress determined to assign the duty of when to suspend deportations to the INS and then attempted to undertake that responsibility in partnership with it.

2. The Veto Is Unconstitutional as a Violation of the Powers of Either the Executive or the Judiciary.

It is against this constitutional backdrop that the validity of the House's veto must be measured. In making similar separation of powers assessments, this Court has examined the function being performed by the challenged activity and determined whether the performance of that function by the encroaching branch transgresses the boundaries established by separation of powers. *Buckley v. Valeo, supra*, 424 U.S. at 137-41; *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 588-89; *Springer v. Philippine Islands, supra*, 277 U.S. at 202-203. As the Ninth Circuit recognized (App. 28a, 37a), not every action by one branch affecting another is forbidden; the doctrine only operates to preclude those which prevent the other "from accomplishing its constitutionally assigned func-

tions." *Nixon v. Administrator of General Services,* 433 U.S. 425, 443 (1977). Whatever the outer limits of the doctrine may be, the legislative veto here strikes at the core of both executive and judicial functions.

Focusing on the specific veto of the decision to grant relief to Chadha, it is not entirely clear whether the action was executive or judicial in character. The statement made on the floor of the House at the time of the veto reveals only the view of the resolution's sponsor that "the aliens did not meet these statutory requirements, particularly as it relates to hardship . . ." 121 Cong. Rec. 40800 (1975). However, this Court need not categorize the particular veto because under either view the House violated the Constitution.

If the House exercised its veto because it disagreed with the Immigration Judge's weighing of the evidence or did not believe that he exercised his discretion correctly, it was interfering with the execution and administration of the laws. "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . ." *Springer v. Philippine Islands, supra,* 277 U.S. at 202. Moreover, enforcement is a function that constitutionally may be exercised only by "Officers of the United States." Therefore, if the House was in fact performing this function, its Members were violating the Constitution's incompatability clause – "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." Article I, § 6, cl. 2. *See Buckley v. Valeo, supra,* 424 U.S. at 124-41. Congress cannot both make and implement the law.

Alternatively, if the House was not merely disagreeing with the Executive's exercise of discretion, but instead

determined that the Executive had exceeded the discretion assigned to it, it was also acting outside its constitutional authority. While Congress can certainly provide for review of executive actions to determine if there has been an abuse of discretion, such review is a judicial, not a legislative, function. Similarly, if the House vetoed the suspension order because it believed that the INS had "misinterpreted" the statutory requirements, the veto may have been for a legitimate purpose, but the means employed were impermissible. Under our Constitution it is the Judiciary, not the legislature, which is responsible for determining questions of whether the law has been followed. *Kilbourn v. Thompson, supra,* 103 U.S. at 192-93; *id.* at 189 (House of Representatives "is in no sense a court").

If the INS denies an alien's request under section 244, the alien has a right to seek judicial review. 8 U.S.C. § 1105a. However, there is no judicial review of decisions favorable to aliens, and the veto may thus be seen as an alternative check by Congress on executive action. Indeed, this appears to have been the understanding of the sponsor of the veto resolution applicable to Chadha and five other aliens out of the 340 then under consideration. *See* p. 4, *supra.* Seen in this light, the action of the House of Representatives is plainly revealed as judicial in character and exceeds the legislative authority granted to it under Article I. Congress cannot both make and judge the law.[17]

Analyzing the veto instead from the perspective of "control," or interference with the performance of another

[17]It is particularly offensive to find Congress acting in a judicial capacity without minimal due process protections, meting out what the court of appeals accurately described as "[s]ummary reversal[s]" (App. 53a).

branch's responsibilities, leads to the same conclusion. The Constitution specifically provides that certain responsibilities should be shared, but that other responsibilities must be performed by one branch alone. Otherwise, if responsibilities are shared, separateness breaks down, and the independence of the branches will be destroyed.

Admittedly, Congress has broad discretion in the manner in which it allocates responsibilities under a given law. Thus, it can pass legislation dealing with problems in the most minute detail, as it often does in the tax area. Congress can also reverse specific executive actions when it does so by statute, rather than by resolution. Conversely, Congress can give broad discretion to a particular agency by assigning it extensive authority under very generalized standards. But once Congress has assigned a function by statute to the Executive, it becomes an executive power which cannot be shared and cannot be subjected to unilateral congressional control. Here, the decision on whether to grant a particular alien relief from deportation was assigned by statute to the Attorney General, and that decision must remain an executive function, beyond the control of Congress, until such time as Congress withdraws that power through a new legislative act, passed by both Houses and signed by the President or enacted over his veto.

This principle has long been accepted in the analogous area of appointments. Congress can establish executive positions and set standards for removals, but once an appointment has been made and confirmed by the Senate, the congressional role is finished, except for possible impeachment. *Myers v. United States, supra.* Congress cannot undo the appointment except by abolishing the office, a task which requires another duly enacted statute. *Cf. United States v. Nixon, supra,* 418 U.S. at 696. In the past

Congress has required either private bills or affirmative votes of approval to cancel deportation orders (*see* pp. 29-31 *supra*), but it chose another method to exercise control over such decisions in section 244(c)(2). However, since that role involves a sharing of responsibility with the Executive in carrying out the laws, it is forbidden by principles of separation of powers.

3. Even if the Veto Is Viewed as a Legislative Act, It Is Unconstitutional.

Since the veto cannot stand if the House was performing executive or judicial functions, it can only be upheld if it was a proper legislative act. Under Article I, a law can be enacted only by the concurrence of both Houses of Congress and approval by the President or a vote of two-thirds of each House overriding his veto. Those lawmaking requirements, which this Court has strictly construed, *United States v. California*, 332 U.S. 19, 28 (1947), were plainly not met here. The matter was never presented to the Senate at all, let alone approved by it. Nor was the President given an opportunity to sign or veto the measure. Thus, if the veto is to be sustained, it must be on some other basis. Accordingly, we now turn to the other legislative justifications offered in defense of the veto, principally that urged on this Court in the House and Senate briefs – that there was in fact no veto and that Jagdish Rai Chadha and five other aliens simply failed to gain the necessary approval of both Houses of Congress in order to remain in this country.

The principal, if not the only, defense raised by Congress in the court below and in this Court is that the action here was simply a recommendation of the Executive Branch which was not approved by Congress (H.Br. 38). According to the House (Br. 31), for those aliens whose

recommendations are approved, the approval comes through silence of both Houses: "Congress has approved by inaction a change in status of an alien pursuant to Section 244(c)(2). . . ." Although unstated, the Presidential concurrence required by Article I, § 7 presumably occurs through the recommendation of the Attorney General. The theory is that the decision by the INS here was a mere proposal or recommendation, the failure of which, like other proposals rejected by one House, raises no constitutional question (H. Br. 40, "a request for legislative mercy" that fails). In support of their theory, Congress seeks to rely on both the Naturalization and the Necessary and Proper Clauses in Article I, § 8, cls. 8 and 18.

Before examining their theory, a word is in order about the source of the power relied on. The Naturalization Clause, which forms the basis of the underlying laws regarding deportation including the relief provisions of section 244, gives wide, but not unlimited, discretion to Congress. Similarly, the Necessary and Proper Clause has built-in limitations, as Chief Justice Marshall recognized *McCulloch v. Maryland,* 17 U.S. (Wheat) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Thus, in *Reid v. Covert,* 354 U.S. 1, 20-21 (1957) this Court struck down an attempt to extend court martial jurisdiction to civilians stationed overseas with military personnel, noting that the Necessary and Proper Clause does not free Congress from other restraints imposed by the Constitution. *See also Buckley v. Valeo, supra,* 424

U.S. at 135 (rejecting reliance on the Necessary and Proper Clause to defend establishment of the Federal Election Commission appointed in violation of Article II, §2, cl. 2). Therefore, unless a power is proper – *i.e.*, it is not forbidden and is otherwise authorized – these clauses are of no assistance to those defending the veto.[18]

As for the theory itself, which is contained primarily in the brief of the House, it is irrelevant for two principal reasons. First, it is only a theory since it bears no resemblance to the operation of what Congress wrote in section 244(c)(2), nor to what Congress did in preventing the INS from carrying out its decision to grant relief to Chadha. Second, it involves a theory of government – that Congress can act by silence – that is not part of our Constitution.[19]

The House supports its theory by an overly literalistic reading of section 244, wholly divorced from history and reality. As set forth in Point II, *supra*, between 1948 and 1952 Congress did require two-House approval for all hardship cases, but it abandoned that practice because it was too cumbersome and substituted the veto provision now contained in section 244(c)(2). Yet, according to Congress, nothing changed, except silence replaced affirmative approval after 1952. Moreover, to the extent that the in-

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[18]As Justice Frankfurter observed in his concurring opinion in *Reid*, the Necessary and Proper Clause is "not to be considered so much a separate clause in Art. I, § 8, as an integral part of each of the preceeding 17 clauses." 354 U.S. at 43.

[19]Accepting the congressional theory would also enable Congress to avoid all challenges to veto mechanisms by describing the Executive's actions as recommendations and imposing whatever conditions it wished on them. This Court has long rejected the notion that constitutional rights can be foreclosed "by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

tent of Congress is relevant, both committees from which the 1952 law emerged described the veto process as one which allowed the relief approved by the Attorney General to go forward unless either House took "adverse action." S.Rep. No. 1137, 82d Cong., 2d Sess. 24 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 62 (1952).

Even accepting the House's contention that section 244 does not give the Executive final authority to cancel deportation and adjust the status of aliens, the only roadblock after INS approval is a negative vote of either House. In all other senses, the decision to grant relief is final. Unfortunately, Chadha and five others were stopped in 1975, but the remaining 334 aliens had their suspensions ripen into cancellations simply by the passage of time. This marked contrast between the two groups demonstrates that it is little more than sophistry to characterize the action of the House of Representatives here as anything but a veto.[20]

More importantly, the House's defense of the veto depends on a congressional approval mechanism which is not provided for in the Constitution. As this Court observed in *Reid v. Covert, supra*, 354 U.S. at 5-6: "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution" (footnote omitted). Nowhere in the Constitution is there any provision which allows laws to be made or Congress to otherwise act by silence. If two Houses must

[20]The House brief (29-30) points out that decisions of the INS not to suspend deportation are not reviewed by Congress. The fact that only positive "recommendations" must run the congressional gauntlet further demonstrates that the House's action was a veto.

concur in an action, they must do it only by an affirmative vote, not merely by not objecting to it.[21]

Finally, even if the veto did not violate separation of powers, that removes only one-half of the problem. The question remains, is there anything in the Constitution that affirmatively authorizes a veto of executive action by the legislative branch? It is true that the separation of powers doctrine does not demand absolute compartmentalization. Moreover, in some situations, the Constitution allows one branch to act in what would noramlly be thought of as the sphere of another. Thus, the President has a substantial role in the legislative process, proposing as well as being provided the opportunity to approve or veto laws. He is also given the right under Article II, § 3 to call Congress into session, despite the power of Congress to make its own rules and to run its own affairs. Similarly, the prosecutorial function, normally handled by the Executive, is assigned to the House when the issue is whether to vote a bill of impeachment, Article I, § 2, cl. 5, and it is the Senate, not the Judiciary, that tries those whom the House votes to impeach, Article I, § 3, cl. 6. What is vital to note about all of these interbranch activities is that they are specifically provided for in the Constitution.

Most important, the Constitution itself already contains two one-House vetoes: the Senate's vetoes under Article

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[21] In support of its theory of action by silence, the House relies on footnote 30 in Justice White's opinion concurring and dissenting in *Buckley v. Valeo, supra*, in which he found the veto to be proper. *See* 424 U.S. at 285 (H. Br. 40). Justice White was the only member of the Court to reach the merits, and there were only four pages devoted to this issue in the voluminous briefs submitted by the parties and *amici*. Moreover, his opinion related only to the challenge to the veto made under the Presentment Clause, Article I, § 7, and did not purport to address the veto from the perspective of the other constitutional challenges raised here.

II, § 2 over the President's powers to make treaties and appointments. Moreover, in *Myers v. United States, supra,* this Court specifically rejected the implication of another veto which was not provided for in the Constitution. Although *Myers* is generally cited for propositions relating to the power of the President, an equally important, but overlooked aspect of the decision relates to the particular legislative check on the President's right to fire officials at issue there. Thus, Congress had not limited the presidential power by prohibiting him from discharging officials except for cause, but had attempted to require the President to obtain the affirmative approval of the Senate before such discharges were effective. In striking down this requirement, this Court referred to the requirement of Senate approval as a "veto," 272 U.S. at 121, and concluded that, because of its highly intrusive nature, it would be singularly inappropriate to imply any such power in the Constitution in the absence of an express grant. Thus, given the existence of the two one-House vetoes over appointments and treaties, this Court ought to be extremely reluctant to find others by implication. *See Nevada v. Hall,* 440 U.S. 410, 425 (1979); *Alaska v. A.L.I.V.E. Voluntary,* 606 P.2d 769, 774 (Alas. 1980). Therefore, the veto in section 244(c)(2) is unlawful, quite apart from principles of separation of powers, because there is nothing in the Constitution that allows either House, or for that matter both Houses, to veto any action taken by the Executive, with the specific narrow exceptions written in by the Founding Fathers.[22]

[22]If this veto is sustainable, Congress could also provide comparable authority to a single committee, subcommittee, or an individual chairman of a committee or subcommittee, such that if they did not acquiesce in the "recommendation," it would fail. Thus, once Congress departs from the constitutional framework for legislative activities, there is no end to the process by which it might assign standardless legislative authority to either House or any part of it.

It is sometimes argued that, since Congress can assign a power to the Executive subject to a pre-condition, such as the favorable vote of affected persons, *Currin v. Wallace,* 306 U.S. 1 (1939), it can grant that power subject to the condition that there is no unfavorable vote of either House of Congress (*See* S. Br. 12 n.12). However, the fact that Congress can sometimes attach a condition to a power does not mean that it can attach *any* condition it chooses. While Congress can condition tobacco inspections upon a vote of farmers who receive them, it could not, for example, condition them upon an agreement of farmers to relinquish their right to vote. *See Dunn v. Blumstein,* 405 U.S. 330 (1972); *Speiser v. Randall,* 357 U.S. 513 (1958). Thus, if the veto is unconstitutional when done directly, it cannot be upheld by attaching it as a condition to an otherwise valid grant of power: "whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439, 1445-46 (1968). Indeed, Madison warned in his essay on separation of powers that vigilance is especially necessary to uncover and prevent congressional overstepping because Congress "can with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." Federalist No. 48.

The condition in cases such as *Currin* was itself constitutionally neutral since there is no prohibition against tobacco growers voting to decide whether to accept a particular inspection plan. On the other hand, the one-House veto here contravenes the specific constitutional requirements of a Presidential veto opportunity and passage by a bicameral legislature, as well as the prohibition against the interference by one branch with the affairs of another. "It

is a non sequitur to say that, since a statute can delegate a power to someone not bound by the procedure prescribed in the Constitution for Congress' exercise of the power, it can therefore 'delegate' the power to Congress free of constitutional restrictions on the manner of its exercise." Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees,* 66 Harv.L.Rev. 569, 595 (1953). *See also Alaska v. A.L.I.V.E. Voluntary, supra,* 606 P.2d at 777, and the opinion of the court of appeals (App. 58a) (power to do greater does not include lesser). Congress is not required to give the INS the power to grant hardship exceptions from deportation, but once it decides to do so, it cannot attempt to maintain control over the INS by exercise of the veto power. The choice may be hard, but the doctrine of separation of powers requires that it be made.

Attempts at practical justification of the congressional veto on the ground that in today's world the President threatens to dominate the co-equal legislative branch are also unpersuasive. In the first place, factual support for this proposition is dubious in view of the ever-shifting power balance between the two branches. Second, under our form of government no branch can lay claim to powers simply because they are thought to be useful or more efficient. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, supra. Accord, Alaska v. A.L.I.V.E. Voluntary, supra,* 606 P.2d at 778-79. Finally, this argument was raised, though "somewhat obliquely," and rejected in *Buckley v. Valeo, supra,* 424 U.S. at 128. There, this Court swept aside the claim that the Appointments Clause should be read to allow Congress to make appointments in order to avoid an erosion of congressional power, noting that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear

that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." 424 U.S. at 128-29.[23]

In any event, there is no need to abandon our tradition of separation of powers, since Congress has more legitimate avenues than the one-House veto for checking Presidential excesses. As Madison foresaw (II Farrand 587), if Congress fears that an agency may abuse the statutory powers given it, Congress can enact statutes of short duration, with frequent opportunities to renew and modify an agency's authority. Further, Congress can tailor statutes specifically to its desires, and thereby limit the Executive's discretion. Additionally, Congress can expand the scope of judicial review or provide for special reviewing tribunals, if it believes that agencies may depart from congressional intent in their implementation of statutes. Finally, Congress can always prevent the implementation of a particular decision by passing new legislation, and it can properly delay implementation of an agency order for a reasonable period of time in order to consider the need for such legislation. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

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[23] Justice Brandeis has stated that "[t]he doctrine of separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States, supra*, 272 U.S. at 293 (dissenting opinion). Likewise, Justice Douglas recognized in *Youngstown Sheet & Tube Co. v. Sawyer, supra*, 343 U.S. at 633, that, although we "pay a price for our system of checks and balances," it was one that he and the other members of the Court agreed that the Nation must pay in order to maintain its liberty. *See also United States v. American Telephone & Telegraph Co.*, 567 F.2d 121, 133 (D.C. Cir. 1977) (doctrine "often impairs efficiency" but enhances "long-term staying power of government" by "mutual accommodation").

Even if these alternatives were not as efficient as the congressional veto – a doubtful proposition in light of the results of the only empirical study of the workings of the legislative veto to date[24] – their availability shows that there is no pragmatic reason for redefining the separation of powers doctrine to meet congressionally–perceived needs. Congress can effectively control delegations to the Executive without the use of the one-House veto power to overturn agency decisions. There is, in short, no reason, let alone constitutional justification, to invoke what the court of appeals aptly labeled "a species of nonlegislation" (App. 62a) in place of that established in the Constitution.

B. The Veto Also Violates the President's Opportunity to Exercise his Veto, Principles of Bicameralism, and the Doctrine of Undue Delegation.

In addition to violating the principle of separation of powers, the veto is also invalid because it runs counter to the Constitution in three other respects: it evades the right of the President under Article I, § 7 to sign or veto all legislation or other measures having similar import; it violates the principle of bicameralism, which requires the concurrence of both Houses on decisions affecting the public; and it transgresses the prohibition against undue delegation. Although related to concepts of separation of powers, these are independent reasons for striking down the veto.

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[24]See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv.L.Rev. 1369 (1977).

1. The Violation of the President's Rights Under Article I, § 7

As part of the checks and balances built into the Constitution, Article I, § 7 provides that any action of the legislative branch having the effect of law must be presented to the President and either have his approval or be passed over his veto by a two-thirds majority of each House. The history of that provision, referred to as the Presentment Clause, makes it abundantly clear that the House cannot avoid the role of the President by the device of a one-House veto.

On June 4, 1787, after several days of debate, the delegates to the Constitutional Convention, acting as a Committee of the Whole, settled upon an Executive headed by a single person. I Farrand 97. The debate then turned to whether this single Executive needed an absolute veto power over legislation in order to protect his role, and the question was resolved in the negative. *Id* at 103.[25]

Thereafter, James Wilson joined Madison in an effort to give the Judiciary a share of the veto power. Madison argued that a Council of Revision, including judges, was necessary to support an Executive that would otherwise be too weak to protect itself against the Legislature, and that this would also serve to strengthen the Judiciary against the Legislature. *Id.* at 139. However, the majority was of the opinion that maintaining the accountability of the Executive was equally important, and that this could be achieved only if the veto was exercised by the Executive alone. *Id.* at 139-40, 144. *See also* II Farrand 74-79.

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[25]It is ironic that, after the Framers refused to give the President an absolute veto to defend himself from the Legislature, Congress should now assert the right of an absolute veto to use against the Executive.

Persistent in his desire to see the Executive supported in some way by the Judiciary in the exercise of the revisionary power, Madison proposed that "all acts, before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object, 2/3 of each House, if both should object, 3/4 of each House, should be necessary to overrule the objections and give the acts the force of law." II Farrand 298. A compromise was struck, eliminating the role of the Judiciary, but requiring a 3/4 vote by each House to overcome the President's veto. This proposal passed 6-4, with 1 delegation divided. *Id.* at 301. At the end of the day, the following event took place:

> Mr. Madison, observing that if the negative of the President was confined to *bills*, it would be evaded by acts under the form and name of Resolutions, votes, etc. — proposed that "or resolve" should be added after "bill" in the beginning of section 13 with an exception as to votes of adjournment, etc. — after a short and rather confused conversation on the subject, the question was put and rejected . . ..

Id. at 301-02 (emphasis in original).

However, the very next morning, a new motion was offered by Mr. Randolph "putting votes, Resolutions, etc. on a footing with Bills." *Id.* at 304. Madison reports this as a renewal of his motion of the previous day in a "new form." No one noted any substantive differences, and it was approved by a vote of 9-1, 1 absent. *Id.* at 305. The overnight turnabout is undoubtedly accounted for by the fact that reflection revealed that the proposal was intended to close a loophole, rather than to tip the balance of power among the branches.

Subsequently, debate returned to the topic of the proportion of each House necessary to override a Presidential veto. Mr. Williamson, who had prevailed a month earlier with his suggestion of 3/4, now felt that 2/3 would strike a better balance. Mr. Gerry agreed:

> 2/3 will be a considerable, perhaps a proper security. 3/4 puts too much in the power of a few men — The primary object of the revisionary check in the President is not to protect the general interest, but to defend his own department (*id.* at 586).

The vote in favor of 2/3 was 6-4, 1 delegation divided. *Id.* at 587. Thus, with minor stylistic changes, the President's veto authority now appears as clause 2 (concerning bills) and clause 3 (concerning other measures) in Article I, § 7.

During the ratification debates, Alexander Hamilton summarized the concerns of the Framers:

> The propensity of the legislative department to intrude upon the rights, and to absorb the powers of the other departments, has been already more than once suggested. The insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And

> in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands.

Federalism No. 73. *Accord,* Federalism Nos. 48 and 51 (Madison).

From this sequence of debates it is clear that the Framers very deliberately created an Executive with the power to exercise a qualified veto over every bill, resolution, vote, or similar measure having the effect of law. In doing so, they rejected many alternatives also designed to maintain a careful balance between the executive and legislative branches. The result is that all final actions having an effect on the public are covered. *See United States v. California, supra,* 332 U.S. at 28. The disapproval of Chadha's relief from deportation by a single House has such an effect, and thus it cannot lawfully evade the possibility of a Presidential veto.[26]

The Presidential veto provision was intended primarily as a check on congressional encroachment upon executive

[26]The Court of Claims in *Atkins v. United States,* 556 F.2d 1028, 1065 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978), sought to avoid this result by asserting that Article I, § 7, cl. 3, "applies solely to actions 'to which the Concurrence of the Senate and House of Representatives may be necessary,' " and that a one House veto "is not an act requiring such a concurrence." However, this Court has rejected that approach, observing that "neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments." *Kilbourn v. Thompson, supra,* 103 U.S. at 182. *See also* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 Calif.L.Rev. 983, 1066 n. 428 (1975):

> [i]t verges on irrationality to maintain that action by concurrent resolution, whereby Congress is at least held in check by its own structure, is invalid because the veto clause so states, but that the invalidity of a simple resolution, wherein a single House acts without check, is more in doubt.

administration and enforcement of the laws. The one-House congressional veto is a device to secure an overruling influence over executive enforcement of the law, while avoiding the checking power of the Presidential veto. It is thus constitutionally impermissible.

2. The Violation of the Requirement of Bicameralism.

The second great check upon the institutional power of the Congress is the requirement of a bicameral legislature. Article I, § 1 vests all legislative powers "in a Congress" consisting of both "a Senate and House of Representatives." Because section 244(c)(2) seeks to avoid this constitutional requirement in overruling the INS's decision to grant relief to Chadha, it violates the principle of bicameralism, which the court below found "to be one of the most fundamental of the checks on governmental power" (App. 58a). The history of the principle demonstrates how vital it was in creating our system of government.

The principle of a bicameral legislature, which had been part of Montesquieu's plan of government, was part of the Virginia Plan, introduced by Edmund Randolph at the Constitutional Convention on May 29, 1787. Of the two branches of the legislature, one was to be elected by the people, the other by the first branch. Charles Pinckney's draft, based on like principles, was introduced the same day. Commenting on the need for two Houses in the legislature, Pinckney argued:

> The division of the legislature will be found essential, because, in a government where so many important powers are intended to be placed, much deliberation is requisite. No possibility of precipitately adopting improper

> measures ought to be admitted, and such checks should be imposed, as we find, from experience, have been useful in other governments. . . . It adds to that due deliberation, without which, no act should be adopted. . . .

III Farrand 110.[27] On May 31, the division of the legislature was agreed to without debate while the Convention was acting as a Committee of the Whole (I Farrand 48), and on June 21 the convention formally agreed to a bicameral legislature. *Id.* at 358.

Once it had been decided to divide the Congress in two, the debate concentrated on the proportion of representation which should be adopted for each House. This became the crucial decision of the Convention, very nearly creating a permanent impasse between the large and small states. However, the "Great Compromise" was struck on July 16, with the small states managing to preserve an equal vote with the large states in the Senate, while agreeing to representation by population in the House of Representatives. Thus, the two Houses were to represent differing points of view, one representing the view of the people, the other representing the view of the States. In this way it was assured that each would act as a check on the other in their joint exercise of the legislative power. The Great Compromise was sealed into the Constitution by the last clause in Article V which prevents it from being altered unless each State consents.

The concept of bicameralism as a check on each House of Congress was given its fullest expression by the Committee of Detail in its report of August 6:

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[27]See also IV Elliot 257 (remarks of Charles Pinckney before South Carolina Convention); II Elliot 445 (remarks of James Wilson before Pennsylvania Convention); II Elliot 285 (remarks of John Jay before New York Convention).

> The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other.

II Farrand 177. This clause was taken up by the full Convention on August 7, and Gouvernor Morris proposed to strike the phrase "all cases" in favor of the phrase "legislative acts," in response to Colonel Mason's observation that there were some cases in which the negative of each branch might not be intended to be given, as in the case of balloting for appointments. This led to a short debate as to whether each branch should have a negative over appointments. Colonel Mason further argued that the words "legislative acts" might be interpreted to include treatymaking, where it was intended that only the Senate should participate. At this point, Madison proposed that the ambiguous clause be eliminated entirely, by striking out the words "each of which shall in all cases, have a negative on the other . . ." He explained that the idea had been sufficiently expressed in the preceding sentence vesting the "legislative power" in "distinct bodies," and that "the respective powers and mode of exercising them were fully delineated in a subsequent article." II Farrand 197. By subsequent article, he apparently referred to what became Article II, which specifically enumerates those instances in which the concurrence of both Houses is not necessary. Madison's motion passed, 7-3.[28]

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[28]When this clause was finally reworked by the Committee of Style and reported out to the Convention on September 23, the phrase, ". . . to consist of two separate and distinct bodies of men, a House of Representatives and a Senate," read "which shall consist of a Senate and a House of Representatives." II Farrand 565. No one remarked on this rewording. *Id.*

Madison voiced no disagreement with the idea that each House would "in all cases, have a negative on the other." His amendment to delete this clause was designed to eliminate the ambiguity of repeating here what was already being stated more fully elsewhere. It thus seems that the Framers intended that the concurrence of both Houses be required, except in those cases specifically provided for elsewhere in the Constitution, as in the treatymaking and appointment powers enumerated in Article II. In other words, two independent combinations of interests, represented by the two Houses of Congress, would be necessary in order to take actions affecting members of the public. In this way, the Framers attempted, as Madison said elsewhere, to "introduce checks, which will destroy the measures of an interested majority. . . ." I Farrand 108.

Bicameralism, which made possible the most important compromise in the formation of the Federal Union, requires that each House have the opportunity to negate the actions of the other whenever those actions affect persons outside that House. The one-House veto emasculates this principle by allowing one House, acting alone, to act precipitately without taking into account the interest of all segments of the public. Because bicameralism is an independent limitation on the powers of either House acting alone, it precludes a one-House veto from having any effect, quite apart from any violation of other constitutional limitations.

3. The Violation of the Doctrine of Undue Delegation.

Even if this Court concludes that a federal statute can constitutionally reserve to one House of Congress the power to veto a decision to relieve an alien from deportation, the delegation in section 244(c)(2) is unconstitu-

tional because it is wholly lacking in standards and its exercise is not subject to judicial review. *Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.,* 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring in the judgment); *American Textile Mfrs. Institute, Inc. v. Donovan,* ____U.S.____, 101 S. Ct. 2478, 2507-10 (1981) (Rehnquist, J. and Burger, C.J. dissenting).[29] While there can be little doubt that assignments of broad powers to the Executive Branch are generally upheld, the doctrine of undue delegation is still alive, as evidenced by this Court's concern about its possible application as a reason for narrowly construing the statute in *National Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974). The most recent decision dealing with this issue at length is *Amalgamated Meat Cutters & Butcher Workmen v. Connally,* 337 F. Supp. 737 (D.D.C. 1971) (three-judge court). Although upholding the delegation in that case, the opinion makes it clear that challenges such as this are not foreclosed and that there some delegations that are so broad that courts will hold them to be improper, *i.e.,* those which provide no "intelligible principle to which the person or body . . . is directed to conform. . . ." *J.W. Hampton Jr. & Co. v. United States, supra,* 276 U.S. at 409.

Two sentences in *Amalgamated* highlight the defects in the legislative veto at issue here and distinguish it from the Economic Stabilization Act upheld there:

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[29]This argument also assumes, without conceding, that granting the power to a single House of Congress would not run afoul of the Appointments Clause in Article II, § 2, cl. 2, which was the basis for this Court's holding in *Buckley* that the Federal Election Commission as originally established was unconstitutional.

> We do not think that it can be said that the possibility of controls beyond the initial freeze was left without any standard other than the President's unfettered discretion, including the discretion to be unfair and inequitable. This is not a case where Congress indicated an intention to leave the matter wholly to the discretion of the President without any possibility of judicial review.

337 F. Supp. at 757. Section 244(c)(2) provides neither of the elements deemed essential in *Amalgated.* There is no attempt to circumscribe the basis upon which a veto can be exercised. Either House can veto the INS's decision because it believes it to be unauthorized, unwise, or unsupported by the evidence. It can even use its veto power because of personal animosity toward the individual alien, or for no reason at all. Indeed, this delegation has gone so far that it does not include a single word attempting to describe the situations in which a veto is proper. As this Court noted in striking down a loitering statute as unconstitutionally vague: "Where, as here, there are no standards governing the exercise of discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972). In short, the deficiency in this delegation is not simply an inadequate standard, but the total absence of any standard at all.

Equally fatal is the absence of any provision for judicial review. As the court noted in *Amalgated,* "[t]he safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers." 337 F. Supp. at 759. Given the absence of standards governing the exercise of the veto, there is

plainly nothing to review, even if a statutory basis could be found for doing so.

It is true, of course, that in general Congress' power to enact legislation is not constrained by detailed standards. But even that overstates the freedom of Congress, because Article I, § 8 limits the subjects of legislation to those enumerated, and the Bill of Rights and other constitutional provisions further restrain the legislative power. Perhaps more important in practical terms is that, unlike the veto exercised here, legislation requires the concurrence of two Houses and the opportunity for a Presidential veto. These limitations provide vital checks on the unfettered discretion of either House, checks that are absent when one House is delegated standardless and unreviewable discretion of the kind exercised here. Thus, when, as here, those other checks are absent, the check of the doctrine of undue delegation should apply. Accordingly, even if all of Chadha's other constitutional arguments are rejected, the veto still must fall because of the unfettered discretion granted to either House in section 244(c)(2).[10]

[10]Although its decision did not rest on that theory, the court of appeals recognized the problem of undue delegation created by a legislative veto (App. 33a & note 33).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Nos. 80-1832, 80-2170, 80-2171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

—v.—

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

UNITED STATES SENATE,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion For Leave To File And BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 80-1832, 80-2170, 80-2171

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant,

—v.—

JAGDISH RAI CHADHA, *et al.*,
Appellees.

UNITED STATES HOUSE OF REPRESENTATIVES,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

UNITED STATES SENATE,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,
Respondents.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association (the "ABA" or the "Association") respectfully moves pursuant to Rule 36.3 of the Rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of action taken by the Executive in execution of a statute is unconstitutional. Counsel for petitioner United States Senate, appellant and respondent United States of America, and appellee and respondent Jagdish Rai Chadha have consented to the filing of this brief. The consent of counsel for petitioner United States House of Representatives was requested but refused.

This case presents to the Court for the first time the question of the constitutionality of a "legislative veto". *Cf. Buckley v. Valeo,* 424 U.S. 1, 140 n.176 (1976). *See also Clark v. Valeo,* 559 F.2d 642, 647 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977). To date, Congress has enacted hundreds of veto provisions, most of them during the last decade. A number of these apply to rulemaking by administrative agencies. Bills are being actively considered by Congress which would apply a legislative veto across the board to all administrative rulemaking.

The American Bar Association, a national organization of lawyers, has a special interest in this matter—not only because of its charter to "uphold and defend the Constitution and maintain representative government" but also because the legislative veto, particularly in its increasingly frequent application to rulemaking subject the Administrative Procedure Act (the "APA"), directly affects the practice of its members before federal administrative agencies. The ABA was actively involved in drafting, and prompting congressional consideration of, the legislation that was ultimately enacted as the APA in 1946. Through one of its standing sections, the Section of Administrative Law, the Association monitors the effectiveness of the APA and has suggested numerous amendments to the act in the interest of improving the administrative process. In 1975 the ABA established a special Commission on Law and the Economy, composed of lawyers and economists and chaired by

John J. McCloy,* to study the impact of governmental regulation upon the national economy. The Commission's conclusions were adopted by the Association's House of Delegates, and its final report was issued in 1979.

One of the important conclusions reached in the Commission's report was that general use of the legislative veto poses a serious threat to effective regulatory administration and fundamental constitutional principles. *See* ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform* 88-91 (1979). Representatives of the Association have testified before Congress in opposition to bills proposing to establish an across-the-board legislative veto.

The basis of the Court's decision in this case will be of great importance in guiding Congress and the Executive Branch concerning future use of the legislative veto. Even if respondent Chadha chooses to address those constitutional defects of the device that extend beyond its use in agency adjudication of the sort immediately involved, the Court will be assisted, the ABA believes, by the broad perspective, based upon years of study and experience in all aspects of the administrative process, which this *amicus* can provide. While that study and experience are no doubt matched by the Executive, the Solicitor General may not choose to make all the available arguments; he may not point out, for example, that a vice of the legislative veto sometimes consists not in a reduction but rather in an augmentation of executive power.

The ABA believes that the attached brief will be of assistance to the Court in its consideration of the constitutional

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* The other members of the Commission were Richard B. Smith, Vice Chairman; Elliot Bredhoff, William T. Coleman, Jr., Lloyd N. Cutler, Harry T. Edwards, Henry J. Friendly, F. Mark Garlinghouse, C. David Ginsburg, Rhoda H. Karpatkin, Charles Kirbo, William T. Lifland, Paul MacAvoy, John R. Meyer, Ira Millstein, Roswell B. Perkins, H. Chapman Rose, Sherwin P. Simmons, Albert T. Sommers, Michael Sovern, Edmund A. Stephan, Thomas B. Stoel, Jr., Randolph W. Thrower, Phyllis A. Wallace, Francis M. Wheat, and Richard E. Wiley.

issues raised and therefore requests leave to file the annexed brief as *amicus curiae.*

Dated: January 8, 1982

Respectfully submitted,

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ON APPEAL FROM AND WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association respectfully submits this brief as *amicus curiae* in support of the position that nullification by one or both houses of Congress of actions taken by the Executive in execution of a statute is unconstitutional.

Interest of Amicus Curiae

The interest of the American Bar Association (the "ABA" or the "Association") is set forth in the preceding Motion for Leave to File this brief.

Introduction

Petitioners have sought to portray this case as involving a unique and distinctive statutory provision which, while falling within a general class called "legislative veto", can only be assessed individually in light of its own peculiar history and purpose. Such an approach, which would eschew any generally applicable basis of decision, ignores the compelling need for guidance by this Court. It would effectively condemn the administrative process to continued impairment by the legislative veto into the indefinite future.

Hundreds of legislative veto provisions have been enacted, most within the last decade. These include one-house vetoes,[1] two-house vetoes,[2] so-called one-and-one-half-house vetoes,[3] what might be called reverse vetoes (*i.e.*, requirements for concurrent resolutions of *approval* before agency action becomes effective),[4] two-house vetoes by two-thirds vote,[5] even

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1 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

2 *See, e.g.*, Federal Trade Commission Improvements Act of 1980, § 21, 94 Stat. 374, 15 U.S.C. § 57a-1 (1980).

3 *See, e.g.*, Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1207(a), 95 Stat. 718 (1981) (veto by one house invalidates executive action unless other house affirmatively approves).

4 *See, e.g.*, Export-Import Bank Amendments of 1974, § 8, 88 Stat. 2336, 12 U.S.C. § 635e(b) (1975).

5 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958), reduced to a simple majority of each house by Trade Expansion Act of 1962, § 351(a) (2) (B), 76 Stat. 899, 19 U.S.C. § 1981(a) (2) (B) (1962).

vetoes that alternate from one house to the other[6] or change from one-house to two-house[7] depending on the nature of the issue involved.

As to triggering mechanisms, Congress has enacted veto provisions activated automatically whenever the Executive takes certain action,[8] veto provisions triggered only by disagreement regarding the action between the President and an independent agency,[9] or between the President and one of his subordinates,[10] veto provisions activated by congressional committee disapproval,[11] and even negative veto provisions (requirement of resolution of approval) triggered by congressional committee disapproval.[12]

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6 *See, e.g.*, Federal Election Campaign Act Amendments of 1974, § 209(c), 88 Stat. 1287, 2 U.S.C. § 438(c) (1974).

7 *Compare, e.g.*, District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c) (1), 87 Stat. 814 (1973) (certain District actions subject to disapproval by both houses acting concurrently), *with id.* at § 602(c) (2) (other District actions subject to disapproval by either house acting alone).

8 See, for example, the legislative veto at issue in the present case.

9 *See, e.g.*, Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 6, 72 Stat. 676 (1958). According to the Senate Committee report, "[t]he committee did . . . agree that Congress might well be the adjudicator when the President differs with the Tariff Commission, especially since the original constitutional responsibility and jurisdiction is vested in the Congress." S. Rep. No. 1838, 85th Cong., 2d Sess. 4 (1958).

10 *See, e.g.*, Department of Defense Appropriation Authorization Act of 1975, § 709(c), 88 Stat. 408, 50 U.S.C. app. § 2403-1(c) (1975) (President may approve export application, despite Secretary of Defense's contrary recommendation, unless Congress adopts concurrent resolution of disapproval).

11 *See, e.g.*, Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514 (1958).

12 *See, e.g.*, Colorado River Basin Salinity Control Act, § 208(a), 88 Stat. 274, 43 U.S.C. § 1598(a) (1974).

As to subject matter, some legislative veto provisions affect the very content of legislation, by permitting the President to amend it (absent legislative veto),[13] by eliminating entirely the powers that it confers,[14] by eliminating the powers that it confers on a selective[15] or section-by-section basis,[16] or even by altering (as opposed to merely eliminating) statutory provisions.[17] Those more numerous legislative veto provisions that seek to affect executive application of the law rather than the law itself may apply to the exercise of delegated authority that is merely permissive,[18] or delegated authority that is mandatory,[19] or authority that is not delegated at all but is part of the President's inherent Article II powers (although controllable to some degree by Congress).[20]

As to those whose actions are subject to legislative vetoes, they range from the President, to the President's subordinates, to the heads of independent agencies, to federally chartered corporations, and even to this Court itself (*see* page 20 *infra*).

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13 *See, e.g.*, Act of June 30, 1932, ch. 314, § 407, 47 Stat. 414 (1932).

14 *See, e.g.*, Act to Promote the Defense of the United States, ch. 11, 55 Stat. 32 (1941).

15 *See, e.g.*, Mutual Defense Assistance Act of 1949, ch. 626, § 405(d), 63 Stat. 718 (1949).

16 *See, e.g.*, The Defense Production Act of 1950, ch. 932, § 716(c) (2), 64 Stat. 822 (1950).

17 *See, e.g.*, Universal Military Training and Service Act, Pub. L. No. 82-51, § 1(j), 65 Stat. 80 (1951).

18 See, for example, the authority at issue in the present case, which may be exercised by the Attorney General "in his discretion". Immigration and Nationality Act, § 244(a), 66 Stat. 216, 8 U.S.C. § 1254(a) (1952).

19 *See, e.g.*, Presidential Recordings and Materials Preservation Act, § 104, 88 Stat. 1696, 44 U.S.C. § 2107 note (1974).

20 *See, e.g.*, War Powers Resolution, § 5(b), 87 Stat. 556, 50 U.S.C. § 1544(b) (1973).

In urging the Court to regard this case as presenting an individualized determination, petitioners are in effect suggesting that this proliferating collection of legislative veto provisions be inspected and classified one by one, even though only one (Section 244(c)) has been brought to the bar of this Court in the 49 years since enactment of the first such provision. The volume of enacted legislative veto provisions and the increasing exercise of them are a sufficient circumstance for urging the Court's resolution of the underlying issues in this case. It is the ABA's position that the constitutional infirmities of Section 244(c) are neither created by, nor can be validated by, its own peculiar history and purpose, but rather arise from the generic invalidity of the legislative veto device. A decision which recognizes this invalidity can prevent continued harm to our constitutional system in general and our system of administrative law in particular. By correcting Congress's misapprehensions,[21] the Court can eliminate the necessity for the Executive to make, statute by statute, the governmentally disruptive choice of either observing the veto or appearing to disregard the law.

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21 The absence of any decision by this Court that the legislative veto is unconstitutional has been argued in Congress to be an indication that the legislative veto is constitutional. *See, e.g.*, S. Rep. No. 96-184, 96th Cong., 1st Sess. 18 (1979) (additional views of Senators Schmitt and Goldwater):

> . . ."It is clear, however, that if [the legislative veto] were unconstitutional, we would surely know it by now: since 1932, Congress has enacted over 295 provisions of law with legislative review or veto powers. On those occasions where the veto has been challenged in court, it has not been ruled unconstitutional."

Summary of Argument

As shown in the Introduction, there is compelling need for guidance by the Court in this field. Congress has enacted literally hundreds of legislative veto provisions without authoritative determination of their validity. A decision that appropriately sets forth a clear, generally applicable principle to determine the validity of this form of congressional action can eliminate this harmful uncertainty.

As shown in Point I, the legislative veto violates the principle of separation of powers. That doctrine not only protects, but pre-eminently protects, the Executive obligation to "take care that the Laws be faithfully executed." In principle, unilateral congressional control of implementation of a statute represents an impairment of that function. In practice, the effect of the veto—as exemplified by its application to administrative rule-making—has significantly disrupted the Executive's performance of its function.

As shown in Point II, the legislative veto represents an attempt to avoid the constitutional requirement that legislation be enacted by both houses of Congress and presented to the President for his signature. Whether viewed as involving the invalidation of executive action or the acceptance of executive "recommendations", the legislative veto produces congressional action that is legislative in character and effect. It therefore requires observance of the constitutionally prescribed procedures for legislation.

As shown in Point III, the legislative veto is invalid whether or not, in the particular case, it deprives the President of powers he would otherwise possess, and regardless of whether he acquiesces in, or even urges, its creation. The constitutionally required procedures for legislation were intended not only to protect the Executive from the Congress, but to protect the people from the two branches combined.

As shown in Point IV, there is no unique or irreplaceable legitimate function served by the legislative veto. It is not a necessary, or even an effective, means of assuring appropriate congressional control.

ARGUMENT

I

THE LEGISLATIVE VETO VIOLATES THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

Both petitioners in this case attempt to portray the central issue, on the merits, as one of separation of powers rather than the observance of constitutionally mandated legislative procedures. The House brief devotes less than three pages to the latter issue (House Br. 39-41), and the Senate brief explicitly states the view that "the fundamental issue in this case, if the merits should be reached, is the separation of powers and not issues of legislative formalities." (Senate Br. 32.) As discussed in Point II below, the ABA does not agree with this analysis, but even if it were correct, the legislative veto is invalid on separation-of-powers grounds alone.

As this Court explained in *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881):

> . . ."It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This constitutional principle is of special importance in its application to the Legislative Branch.[22]

> "The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroach-

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22 "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . . ." *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928).

ments which it makes on the co-ordinate departments." *The Federalist*, No. 48, at 334 (J. Cooke ed. 1961) (J. Madison).

A. Governmental Functions Delegated to the Executive Are Protected by the Doctrine of Separation of Powers

The House brief (House Br. 25-26) asserts that the separation of powers doctrine is violated by Congress only if Congress interferes with some executive function *other than* the obligation to "take care that the Laws be faithfully executed" (Art. II, § 3). This in fact reverses the main thrust of the doctrine. The execution of laws enacted by Congress is the very *core* of the Executive's responsibility, as the title "Executive" alone should suggest. And it is precisely *when* the President is executing laws enacted by Congress that the need for clear separation of powers is most pronounced. The passage from Montesquieu, quoted in *The Federalist* to provide a "demonstration of the meaning" of separation of powers, reads:

> "When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws, to *execute* them in a tyrannical manner." *The Federalist*, No. 47, at 326 (J. Cooke ed. 1961) (J. Madison, quoting Montesquieu, *The Spirit of Laws*) (emphasis in original).

The House and Senate briefs attempt to avoid the force of this principle by seeking to equate it with "the discredited notion that the separation doctrine means total separation of each of the three great functions of government" (House Br. 22; *see* Senate Br. 34). It is not the same. The issue is not whether, as the House brief puts it (House Br. 24), Congress may "blend and mix" the functions of government. It assuredly may—by delegating to the Executive, for example, functions of a characteristically legislative or judicial nature. Rather, the issue is whether, once functions of whatever nature have been delegated, Congress may continue to exercise and control them unilaterally as though they were still within its

own domain. A principle of "blending and mixing" in this sense would amount to a nullification of the doctrine of separation of powers.[23]

Congress may constitutionally confer upon the Executive a wide range of governmental functions, but, once conferred, they are insulated from direct congressional control except through the process of legislation.

B. The Legislative Veto Disrupts Executive Functions

Not all congressional impingement upon executive action violates the doctrine of separation of powers. The test, as expressed by this Court, is whether the congressional action "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977).

The result of that test applied to a legislative veto should be clear, since the purpose and effect of the legislative veto is to transfer back to one or both houses of Congress dispositive control of implementation of a statute. Nonetheless, the ABA wishes to call the Court's attention to the concrete, disruptive effects of the legislative veto, particularly in the critical context of agency rulemaking.

• Experience with the actual operation of the legislative veto has shown that it produces an *ad hoc*, after-the-fact, piecemeal approach to the formulation of general policy.[24] The

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[23] Such unilateral congressional control is impermissible whether or not the delegated functions are of a characteristically legislative or judicial nature. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Federal Election Commission's "broad administrative powers" (*id.* at 140), including rulemaking, though conceded to be "more legislative and judicial in nature than . . . the Commission's enforcement powers" (*id.* at 140-41), were nonetheless held to trigger the President's exclusive constitutional prerogative to appoint "officers of the United States" within the meaning of Article II, section 2, clause 2 of the Constitution. The approach of that case is inconsistent with the notion that the Constitution's structural division of powers is somehow altered when "blended and mixed" functions are at issue.

[24] *See, e.g.*, Symposium, *1976 Bicentennial Institute—Oversight and Review of Agency Decisionmaking*, 28 Ad. L. Rev. 569, 581 (1976) (state-

veto of a rule belonging to an integrated regulatory scheme leaves only a void which can distort or even destroy a comprehensive program.[25] It permits Congress to avoid the difficult task of devising an alternative rule, while providing little guidance to an agency seeking to fulfill its statutory mandate.[26]

• The legislative veto inevitably increases delay and uncertainty in the administrative process.[27] Such delay infects rulemaking prior to the submission of rules to Congress, as agency staffs engage in protracted, tripartite negotiations with committee staffs of both houses, or as agencies await a politically propitious moment for the submission of rules. In order to avoid the possibility of a rule veto, agencies may choose to formulate their policy through case-by-case adjudication rather than notice-and-comment rulemaking, with consequently reduced guidance to the regulated. Disapproval of a rule halts the process of governing when an agency and either house differ irreconcilably over statutory interpretation or administrative policy. Even agency rules that are not disapproved bear

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ment of Roderick M. Hills, Chairman of the SEC); *id.* at 671, 698-99 (statement of Marcus A. Rowden, Commissioner, Nuclear Regulatory Commission).

25 *See, e.g.*, Senate Committee on Government Operations, *Study on Federal Regulation II: Congressional Oversight of Regulatory Agencies*, S. Doc. No. 26, 95th Cong., 1st Sess. [hereinafter *"Study on Federal Regulation II"*] 120 (1977); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Anderson).

26 *See, e.g., Study on Federal Regulation II* at 120 (testimony of Lloyd N. Cutler).

27 *See, e.g.*, 126 Cong. Rec. S1090 (Feb. 6, 1980) (remarks of Senator Muskie); *Study on Federal Regulation II*, at 118-19; *Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Senate Committee on Government Operations*, 94th Cong., 2d Sess. [hereinafter *"S. 2258 Hearings"*] 545 (1976) (statement of Roderick M. Hills, Chairman of the SEC); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1379-80, 1397, 1400 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146-47 (1977).

the hidden cost of postponed implementation during the review period. With delay comes uncertainty as to the form and effective date of regulations, a burden borne by all who must plan and act on the basis of governmental decisions.

• The legislative veto tends to undermine notice-and-comment rulemaking subject to the safeguards of the APA, replacing it with informal negotiations between the agencies and the staffs of congressional committees.[28] These negotiations can take on a life of their own, leading to the effective, if not readily recognized, amendment of statutes. While apparent power lies in agencies going through the process of public rulemaking, actual power is wielded by committee staffs operating beyond the public eye.

• Even if a congressional committee were disposed to review all the agency rules committed to its charge by a legislative veto provision, and even if staff attention were deemed an adequate substitute for personal consideration by elected representatives, a staff large enough to conduct the task is not likely to be available.[29] In fact, however, congressional intervention through the threat or exercise of a legislative veto has been sporadic and unpredictable, often responding to the political strength of the interests affected by the proposed rule.[30] There

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28 *See, e.g.*, 126 Cong. Rec. S1096 (Feb. 6, 1980) (remarks of Senator Ford); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1377-78, 1404, 1412-14, 1417-20 (1977).

29 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1095 (remarks of Senator Ribicoff); 122 Cong. Rec. 31636 (Sept. 21, 1976) (remarks of Representative Frenzel); *id.* at 31639 (remarks of Representative Bingham); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1415 (1977); McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1146 (1977).

30 *See, e.g.*, 126 Cong. Rec. S1080 (Feb. 6, 1980) (remarks of Senator Hart); *id.* at S1081 (remarks of Senator Biden); 122 Cong. Rec. 31639 (Sept. 21, 1976) (remarks of Representative Bingham); *S. 2258 Hearings*, at 496 (statement of Karl E. Bakke, Chairman of the FMC); *id.* at 547 (statement of Roderick M. Hills, Chairman of the SEC).

is no standard for exercise of a legislative veto and no discipline to assure consistency of treatment from one session of Congress to the next.

• The judicial review stage of the rulemaking process is also impaired. When Congress disapproves a rule on the ground that the rule is not in accord with the authorizing statute's intent, it in effect preempts the judicial review function. Moreover, when a court reviews under Section 706 of the APA a rule that has passed challenge in the Congress, the court will be reluctant to apply normal standards—perhaps appropriately so if petitioners' theory that the failure to veto constitutes congressional "acceptance" of a "recommendation" is to be credited.

Some examples of the legislative veto in operation make these adverse effects clear:

1. In *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977), this Court had before it the Presidential Recordings and Materials Preservation Act, Title I, 88 Stat. 1695, 44 U.S.C. § 2107 note (1974). The act required the Administrator of General Services to submit to Congress proposed regulations governing public access under the act and provided that they would be ineffective if disapproved by either house.

Notwithstanding the Administrator's compliance with the requirement that he submit the proposed regulations within 90 days of the enactment of the act, no regulations were yet in effect two and one-half years later when this Court rendered its opinion. The Court described the genesis of this deadlock as follows:

> . . . "The initial set [of regulations] proposed by the Administrator was disapproved pursuant to § 104(b) (1) by Senate Resolution. . . . The Senate also disapproved seven provisions of a proposed second set, although that set had been withdrawn. . . . The House disapproved six provisions of a third set. . . . The Administrator is of the view that regulations cannot become effective except as a

package and consequently is preparing a fourth set for submission to Congress." 433 U.S. at 437 (citations omitted).

2. Another example of the actual workings of the legislative veto is provided by the Federal Election Campaign Act of 1971,[31] as amended by the Federal Election Campaign Act Amendments of 1974.[32]

By the time of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), holding that the appointment of four members of the Federal Election Commission by Congress pursuant to the 1974 amendments violated the doctrine of separation of powers,[33] the Federal Election Commission had already produced rules to implement the 1974 amendments. One of these had provided for initial filing of reports of contributions and expenditures with the Commission, with copies to be forwarded to the Senate and the House. The House had vetoed that proposed rule on the ground that it conflicted with the provision of Section 438(d) of the act that reports were to be "received by" the Clerk of the House and the Secretary of the Senate "as custodian for the Commission."[34]

The Commission had also proposed a rule to the effect that contributions received by an incumbent federal officeholder to defray the costs of office were subject to the statutory limitations on contributions and expenditures. 40 Fed. Reg. 32951 (1975). A Senate committee had criticized this, whereupon the Commission had submitted a revised proposal.[35] This had been

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31 Pub. L. No. 92-225, 86 Stat. 3 (1972).

32 Pub. L. No. 93-443, 88 Stat. 1263 (1974).

33 The Court expressly noted that it was not passing upon the constitutionality of the legislative veto provisions of the 1974 amendments. 424 U.S. at 140 n.176.

34 H.R. Res. No. 780, 94th Cong., 1st Sess.; 121 Cong. Rec. 33664-74, 33699 (1975).

35 S. Rep. No. 94-409, 94th Cong., 1st Sess. 2 (1975).

rejected by the Senate,[36] its committee having concluded that the Commission "may have exceeded" its statutory authority.[37]

When the Federal Election Commission was reconstituted after this Court's decision in *Buckley v. Valeo*, it proposed new regulations[38] and held a series of informational meetings in various regions of the country, as well as formal hearings. Nevertheless, because of the legislative veto provisions, no regulations had become effective by the time of the 1976 election:

> "Despite the FEC's careful preparation, or perhaps because of it, the proposed regulations were again negated by Congress. This time, however, there was no open vote on a veto resolution in one of the houses of Congress, but a legislative version of the 'pocket veto.' When the Ninety-Fourth Congress adjourned *sine die* on October 1, 1976, the FEC's rules had lain before it for only twenty-eight of the required thirty legislative days. Congress had rejected requests by the Commission that it remain in session for two more days so that the rules could take effect before the 1976 elections; thus the rules were left in limbo." Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1408 (1977) (footnotes omitted).

3. The history of energy-related legislation provides further examples of the paralysis of executive action which is effected by the legislative veto. For instance, the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (1973), gave the Executive Branch power to exempt certain petroleum products from allocation and price controls, subject to a legislative veto. For nearly two years, repeated attempts by the Executive to exercise this delegated authority were frus-

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[36] S. Res. No. 275, 94th Cong., 1st Sess.; 121 Cong. Rec. 31776 (1975).

[37] S. Rep. No. 94-409, 94th Cong., 1st Sess. 3 (1975).

[38] 41 Fed. Reg. 21571, 21591 (1976).

trated by the threat and exercise of this veto power. *See* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1390-92 (1977). Finally, Congress resolved the issue by legislation. *Id.* at 1392.

In sum, experience with operation of the legislative veto, as it has proliferated in the field of administrative rulemaking during the last decade, has amply demonstrated that it prevents the Executive Branch from performing its constitutionally assigned functions. *A fortiori*, the legislative veto can be expected to have a disruptive effect when applied to administrative adjudicatory actions, as in this case now before the Court.

II

THE LEGISLATIVE VETO IS AN INVALID ATTEMPT TO AVOID THE LEGISLATIVE PROCEDURES MANDATED BY THE CONSTITUTION

Even though the legislative veto is invalid on separation-of-powers grounds alone, that doctrine is not—contrary to petitioners' assertions—the sole issue in this case. That issue arises only *as a result* of Congress's failure to observe what petitioners refer to (and dismiss) as "legislative formalities." No one contends that Congress's enactment of a *law* rescinding an agency rule or even revoking an agency order would be unconstitutional insofar as the doctrine of separation of powers is concerned (although issues might be presented under the ex post facto or bill of attainder clauses). Congress has acknowledged power to make or change the programs and policies to be implemented by the Executive, and the only issue is *how* it may do so. The other constitutional points raised by respondents below (evasion of the presidential veto and of the requirement of bicamerality) also turn upon the observance of "legislative formalities." Ultimately, the central issue with respect to the legislative veto is when Congress must follow the procedures for legislation set forth in the Constitution.

During the 145 years of our national history before enactment of the first legislative veto provision (and perhaps the more than 175 years before the first exercise of a legislative veto) it was quite clear when "legislative formalities" had to be observed. As the Senate Judiciary Committee stated in 1897, all of them—not only the requirement of presidential participation, but also the requirement of concurrent action by the two houses—must turn

> "not upon [the] mere form [of the resolutions], but upon the fact whether they contain matter which is properly to be regarded as *legislative in its character and effect*." S. Rep. No. 1335, 54th Cong., 2d Sess. 8 (1897) (emphasis added).

A. The Invalidation of Executive Action Is Legislative in Character and Effect

The invalidation by Congress of executive action—whether in suspension of deportation or issuance of binding regulations—is action by Congress that is "legislative in its character and effect". The major proportion of federal legislation consists of authorization for executive action; and elimination or repeal of that authorization is a legislative act as well. The legislative veto consists of an announcement in a statute authorizing executive action that Congress reserves the right to eliminate that authorization by a means other than plenary legislation. The announcement might appear plausible in that Congress does not *have* to confer the authorization in the first place—so it would seem Congress may confer it with such limitations as it desires. In law, however, the greater does not always include the lesser. The power to withhold does not import unrestricted power to condition the grant. Congress may, for example, refuse entirely to fund a particular program, but if it chooses to do so it may not limit the beneficiaries to whites, or to Republicans, or in any other fashion that would violate constitutional prescriptions.[39] So also here. To affirm that Congress in a case such as this may withhold the immigration parole power from the Executive is not to establish that it may grant that power with the limitation that it be controlled or withdrawn in an unconstitutional fashion.

In its particular application to rulemaking, the legislative veto is sometimes defended on the ground that the congressional action need not follow constitutional requirements for legislation because it makes no change in the law. To the contrary, it is asserted, vetoing a rule prevents a change of law from occurring. This argument does not use the ambiguous term "law" in the relevant sense. Used in one sense, law is the body of governmental prescriptions binding upon the public, including agency rules—so that violation of a valid INS regulation is said to be a "violation of law". Used in another sense,

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[39] *See, e.g., Sherbert v. Verner,* 374 U.S. 398 (1963).

law connotes only those prescriptions that are the work of Congress, many of which empower or restrict the Executive Branch of government but do not affect citizens directly—so that a valid INS regulation is said to be "authorized by law". It is possible to "change the law" in one of these senses without changing it in the other, but only a change in the legislature-made sense is relevant to the need for the constitutionally prescribed procedures. Thus, when an agency issues a new regulation, the law is not changed in the legislature-made sense even though there is a change in the law that binds the public. On the other hand, when Congress repeals a rulemaking authorization, the law is changed in the legislature-made sense even though the law binding upon the public may be unaffected—as would be the case if the rulemaking authorization had not been used by the authorized agency.

The exercise of a legislative veto makes the same sort of change in legislature-made law as repeal of a rulemaking authorization, because forestalling implementation of a valid rule is equivalent to rescinding the statutory authorization for that rule. While in the enabling statute that confers authorization for a rule Congress can give notice (through inclusion of a legislative veto provision) that it reserves the unilateral right to rescind, the exercise of a legislative veto is no less a rescission, no less a "change in the law" in the relevant sense. Congress's advance specification that it intends to disregard constitutionally required procedures in no way renders that disregard more permissible. *Cf. Smith v. Maryland,* 442 U.S. 735, 741 n.5 (1979).

B. The Acceptance of Executive Recommendations Is Legislative in Character and Effect

Petitioners advance another interpretation of the legislative veto provision at issue in this case. According to the House brief, "[a]t no point . . . has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens shall be allowed to remain in the United States . . . . Congress has retained that power unto itself". (House

Br. 28) The Senate brief argues that "[t]he nature of the Attorney General's role" is "recommendatory", and in accepting or rejecting the Attorney General's "recommendation", "the Congress exercises its own judgment whether permanent residence should be granted." (Senate Br. 29, 30)

Such a characterization is not consistent with the language and structure of Section 244(a), delegating the power of status determination to the Attorney General.[40] Even if it were, however, there is no reason why it would alter the case. It amounts to an admission that the very same congressional "judgment whether permanent residence should be granted", which used to be made through the normal legislative process in the consideration of private bills, is now made through the legislative veto process. It is impossible to understand how that

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[40] In this case, the Attorney General suspended deportation pursuant to subsection (a) of Section 244, 8 U.S.C. § 1254, which provides, in part:

> . . ."[T]he Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—
>
> (1) is deportable . . . ; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien . . . ."

The House of Representatives then vetoed the Attorney General's suspension order pursuant to subsection (c) of Section 244, which states:

> "(2) In the case of an alien specified in paragraph (1) of subsection (a) of this section—
>
> if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien's voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings."

action can be "legislative in its character and effect" in one instance but not in the other.

To put the matter another way, what—other than Congress's own fiat in Section 244(c)—permits Congress to accept the Attorney General's "recommendation" through pure inaction, though it can only accept the recommendations of its own staff through the enactment of legislation? Or may it extend this technique to the recommendations of its staff as well? The idea is not as far-fetched as it might seem. Since its relatively recent birth in 1932, the legislative veto has been progressively extended from action (or "recommendation") by the President,[41] to action by his subordinates (*e.g.*, the legislation at issue in the present case, involving action by the Attorney General), to action by independent agencies,[42] to action by this Court (the legislative veto of Court-adopted amendments to the Federal Rules of Evidence[43]), to action by a federally chartered corporation that is a federal instrumentality,[44] to action by a federally chartered corporation that is *not* a federal instrumentality.[45]

* * * *

In short, neither of petitioners' suggested theories suffices to explain why the legislative veto is entitled to dispensation from normal legislative procedures. Viewed as a device to elicit executive "recommendations" to Congress, it runs afoul of the requirement for the constitutionally prescribed procedures when those recommendations are accepted. And viewed as a

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41 *See* Act of June 30, 1932, ch. 314, 47 Stat. 414 (1932).

42 *E.g.*, Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

43 *See* Federal Rule of Evidence 1102, 28 U.S.C. § 2076 (1975).

44 *See* Pennsylvania Avenue Development Corporation Act of 1972, Pub. L. No. 92-578, 86 Stat. 1266 (1972).

45 *See* Section 8 of the Amtrak Improvement Act of 1975, Pub. L. No. 94-25, 89 Stat. 90 (1975).

delegation subject to defeasance, it runs afoul of the requirement for the constitutionally prescribed procedures when the action effecting the defeasance is taken. Nor does it save the veto process in the present case to describe it as "nothing more than a request for legislative mercy". (House Br. 40) Legislative mercy, like legislative justice, or for that matter legislative severity, must be meted out by legislation.

III

THE LEGISLATIVE VETO UNCONSTITUTIONALLY AUGMENTS THE COMBINED POWER OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

There runs through the House and Senate arguments in this case—as there runs through most arguments seeking to justify the legislative veto—the notion that, after all, the Executive is not really harmed. "Section 244," the Senate brief asserts (Senate Br. 28), "augments, and in no manner infringes upon, executive power." Before 1940, after all, the Executive had no role (except through the President's participation in the legislative process) in the canceling of deportations; now, it has "the important but limited role of suspending deportations and reporting to the Congress." (Senate Br. 29) Moreover, since the cancellation only occurs when the President (who, through the Attorney General, proposes it) and both houses (which, through failure to veto, approve it) *agree,* it is in effect legislation in reverse. Therefore the Executive is not harmed; therefore the principle of separation of powers is not violated; and therefore the device is constitutional.

It is not clear, however, that as a general matter the Executive is not harmed by the legislative veto. Viewed in a realistic fashion, it is impossible to say that the device does not profoundly affect the balance of powers between the first two branches. With respect to the vast majority of executive authorizations to which the legislative veto has been attached, the choice is not between no executive authorization and executive

authorization with a legislative veto. Congress has, to be sure, the *power* to withhold the authorization unless the veto is attached to it; but as a practical matter it will not often do so. For example, the realistic choice is not whether the Environmental Protection Agency will have rulemaking functions with the legislative veto attached or no rulemaking functions at all; it is whether EPA rulemaking, which is sure to exist, will or will not be encumbered by the veto. The same may be true of the Attorney General's function at issue in the present case.

But even if the Executive were not harmed, the legislative veto would nonetheless distort our system of government. The "legislative formalities" set forth in the Constitution, which in Article I, Section 7 give the President a role in the legislative process, do serve to protect the Executive against encroachment upon his powers. More importantly, however, those formalities were designed to protect the people. The damage done to the people by ignoring them happens to be greatest when the damage done to the Executive is least—that is, when it is indeed true that if the President had not received the delegated authority subject to a legislative veto he would not have received the authority at all. In these situations, Congress and the Executive sometimes have combined to erect a structure that will deprive the people of their democratic right to have their representatives *vote* on major, often controversial, changes from the status quo—changes which Congress has not unconditionally approved, but which it later approves by inaction, in declining to veto the Executive's "proposal."

Congress may "reserve the decision to itself" instead of committing it to the Executive, but if Congress considers the decision that important, then *when* it decides, it must do so with observance of legislative formalities that include not merely Presidential participation in its decision (through Article I, Section 7) but also affirmative action by both houses. The Founding Fathers were not unaware that this was a cumbersome process, in which the forces of factionalism, regionalism, institutional jealousy and personal ambition would render legislative action difficult. But they regarded it as

a necessary assurance against not merely the weakening of Executive authority but also the impairment of minority rights and, quite simply, ill-considered legislation.

> "Another advantage accruing from this ingredient [of equal State representation] in the constitution of the senate, is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states. It must be acknowledged that this complicated check on legislation may in some instances be injurious as well as beneficial . . . . But . . . as the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice than it appears to many in contemplation." *The Federalist*, No. 62, at 417 (J. Cooke ed. 1961) (J. Madison).

The Constitution does not provide that this cumbersome, bicameral, affirmative legislative process can be avoided, or converted into a process of mute legislation, by an Act of Congress "reserving its decision", nor even by mutual agreement between the Legislative and Executive Branches.

IV

The Legislative Veto Is Not A Needed Means Of Congressional Control

Evaluation of the legislative veto's constitutionality should not be influenced by the mistaken belief that it is an essential device of modern government.

Petitioners contend that Section 244(c) is one of the "hybrids that work"; that it has "benefited thousands of deportable aliens over the past forty years"; and that it has "served an entirely beneficial purpose." (Senate Br. 24) But if, as petitioners suggest, that purpose were merely to permit congres-

sional acceptance of executive "recommendations," could not those recommendations have been presented in the form of proposed bills as the Constitution envisions? The houses of Congress could even modify their procedures to permit expedited consideration of such recommendations, so that the proposed bills would be (almost always) routinely passed—just as under Section 244(c) the legislative veto is (almost always) routinely not exercised. Nothing of substance would be lost except the ability of Congress, under the present arrangement, to "accept" the recommendations without acting upon or even considering them.

In the present era of broad delegation of rulemaking authority to administrative agencies, the legislative veto is sometimes portrayed as an indispensable means of reasserting the power of a Congress that is displeased with agency excesses but that has no means available for "getting control of the bureaucracy." This portrayal, while generous in its treatment of Congress, is not accurate. Congress has at hand numerous means of control. It may, of course, legislate with more specificity in the first place. It may reverse agency rules by legislation—a course it pursued, for example, with respect to Department of Transportation automobile seatbelt requirements.[46] It may by legislation stay agency rulemaking and restrict agency authorization—a course it pursued recently with respect to the Federal Trade Commission.[47] It may decline to authorize or appropriate funds for agency rulemaking that it disapproves.[48] Instead of conferring authority to promulgate rules, it may confer authority to propose legislation—which

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[46] *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, 88 Stat. 1470 (1974).

[47] *See* Federal Trade Commission Improvements Act of 1980, §§ 7, 11, 19, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[48] *See, e.g.*, Act Making Appropriations for the Departments of Labor, and Health, Education and Welfare, and Related Agencies for Fiscal Year 1974, Pub. L. No. 93-192, 87 Stat. 746 (1973).

was the power it originally granted to the Federal Trade Commission.[49] Or it may subject rulemaking to a "report and wait" provision, requiring the rule's effective date to be delayed for a specified period, during which Congress may act to stay or reverse it.[50]

Besides these direct means of congressional control, many indirect means are available. The reality of government is that every item for which an agency requires congressional action—from authorization for new programs, to funding for old ones, to appointment of new officials—can be made the occasion for congressional influence upon any activities of the agency. The agency's continuing dependency upon Congress assures that congressional reports and investigations, committee recommendations, speeches on the floor, even suggestions from individual members of the agency's oversight or appropriations committees, are rarely ignored. In short, the notion that the legislative veto fills some large gap in Congress's power to perform its legitimate functions is without foundation.

While there may be problems in Congress's monitoring of the administrative government it has created, those problems appear traceable not to a lack of adequate means but to (1) the sheer volume and diversity of broad authority delegated to a multitude of specialized agencies,[51] and (2) the compartmentalized nature of the congressional committee structure, which generally requires legislation pertaining to an agency to be brought to the floor by a committee and staff whose point of

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49 Act to Create a Federal Trade Commission, § 6(f), 38 Stat. 717 (1914).

50 *See, e.g.*, Act to Amend the Education of the Handicapped Act, § 620(b), 89 Stat. 773, 20 U.S.C. § 1411 note (1975). This was a technique used by Congress when it acted through legislation to stay, and ultimately to revise in some respects, this Court's proposed Rules of Evidence. *Compare* Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973), *with* Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926 (1975).

51 *See* ABA Commission on Law and Economy, *Federal Regulation: Roads to Reform*, ch. 5 (1979).

view is likely to be as specialized as that of the agency itself. Far from solving these problems, the legislative veto may well aggravate them. Its existence serves to encourage broader and vaguer delegations by the implicit promise (which, as a practical matter, can rarely be redeemed) that actions pursuant to those delegations will be scrutinized by Congress; and its major effect is augmentation of the power of congressional committees and their staffs.[52]

Conclusion

A member of Congress might vote for a legislative veto of executive action on one or more of three grounds, each of which demonstrates the constitutional defect in its exercise:

1. He might wish to veto the executive action because he believes that action to be contrary to or in excess of the legislated intent of the Congress that passed the original statute; but that is to say that the executive action is violative of law—an interpretive function which belongs to the courts and not to the legislature.

2. He might wish to veto the executive action because, although he believes that action to be in accord with the legislated intent of the original statute and therefore not unlawful, he simply disagrees with the manner in which the executive's discretion under that statute has been exercised; but that is usurping the Executive's authority under the original statute (and it can surely make no difference that Congress served notice in the original statute that it intended to usurp).

3. He might wish to veto the executive action because he believes the legislated intent of the Congress which passed the original statute is, in the light of experience, unwise and that the scope of the Executive's discretion should be altered; but

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52 *See generally* Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977).

that requires an act of legislation which must observe the required constitutional "formalities".

For these reasons, The American Bar Association, as *amicus curiae,* respectfully requests that the Court affirm the judgment entered by the United States Court of Appeals for the Ninth Circuit on December 22, 1980.

Dated: January 8, 1982

Respectfully submitted,

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Nos. 80-1832, 80-2170, and 80-2171

IN THE

Supreme Court of the United States

October Term, 1981

Immigration and Naturalization Service, *Appellant*

v.

Jagdish Rai Chadha, et al., *Appellees*

United States House of Representatives, *Petitioner*

v.

Immigration and Naturalization Services, et al., *Respondents*

United States Senate, *Petitioner*

v.

Immigration and Naturalization Service, et al., *Respondents*

On Appeal From and Writs of Certiorari To The
United States Court of Appeals for The Ninth Circuit

**Motion for Leave to File and
Brief of Certain Members of the United States House
of Representatives, amici curiae**

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On Appeal From and Writs of Certiorari To The
United States Court of Appeals for The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Movants ask leave to file the annexed brief as *amici curiae*. Consent has been received from Respondents Chadha, et al., Appellant Immigration and Naturalization Service, and Petitioner United States Senate. The Petitioner United States House of Representatives is the only party which withholds consent.

Movants believe that their position may be useful and distinct from other presentations, in that:

Movants, though appearing here in their individual capacities, have long experience in the House of Representatives and are vitally concerned with its process.

The three of them who are chairmen of subcommittees of the Energy and Commerce Committee of the House - Mr. Florio, Mr. Waxman, and Mr. Ottinger - are either presently involved or will likely become involved with the legislative veto question due to the jurisdictional scope of their subcommittees.

The three House Judiciary Committee members - Mr. Edwards, Mr. Kastenmeier and Mr. Conyers - are directly involved with legislation in their committee touching on the legislative veto. Each is chairman of a subcommittee of the Judiciary Committee.

The remaining three - Mr. Burton, Mr. Rosenthal and Mr. Stark - are subcommittee chairmen of the House Committees on Interior and Insular Affairs, Government Operations, and Ways and Means, respectively. All have long and intimate experience with House processes.

They respectfully request that they be permitted to file the annexed brief as *amici curiae*.

Respectfully submitted,

Robert C. Eckhardt
Attorney for Movants

Philip Burton, John Conyers, Don Edwards, James J. Florio, Robert W. Kastenmeier, Richard L. Ottinger, Benjamin S. Rosenthal, Fortney H. Stark, and Henry A. Waxman.

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Nos. 80-1832, 80-2170, and 80-2171

IN THE

Supreme Court of the United States

October Term, 1981

Immigration and Naturalization Service, *Appellant*

v.

Jagdish Rai Chadha, et al., *Appellees*

United States House of Representatives, *Petitioner*

v.

Immigration and Naturalization Services, et al., *Respondents*

United States Senate, *Petitioner*

v.

Immigration and Naturalization Service, et al., *Respondents*

On Appeal From and Writs of Certiorari To The
United States Court of Appeals for The Ninth Circuit

Brief of Certain Members of the United States House of Representatives, amici curiae

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BRIEF OF AMICI CURIAE

The appeal in No. 80-1832 and the writs of certiorari in Nos. 80-2170 and 80-2171 all stem from the judgment and opinion

of the United States Court of Appeals for the Ninth Circuit and the proceeding there captioned *Jagdish Rai Chadha v. Immigration and Naturalization Service*, CA 9 No. 77-1702, December 22, 1980, reported at 634 F.2d 408.

The cases here on certiorari have come up on petitions for certiorari by House and Senate petitioners, granted October 5, 1981.

JURISDICTION

Jagdish Rai Chadha, appellee-respondent, instituted this proceeding in the Ninth Circuit pursuant to Section 106(a) of the Immigration and Nationality Act of 1952, 8 U.S.C., Section 1105(a), to review a final order of deportation issued against him by the Immigration and Naturalization Service. The jurisdiction of this Court has been invoked under § 8 U.S.C. Section 1254(a)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The various constitutional and statutory provisions *amici* deem especially pertinent to this case are:

(1) Article I, Section 1 of the Constitution.
(2) Article I, Section 7, clause 2 and 3, of the Constitution.
(3) Article I of the Constitution as a whole.
(4) Article II, Section 1, of the Constitution.
(5) Article II, Section 2, clause 2 of the Constitution.
(6) Article II, Section 3 of the Constitution.
(7) Section 244(c)(1)(2)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1254(c)(1)(2)(3).

INTEREST OF AMICI CURIAE

The *amici*, Philip Burton, John Conyers, Don Edwards, James J. Florio, Robert W. Kastenmeier, Richard L. Ottinger, Benjamin S. Rosenthal, Fortney H. Stark, and Henry A. Waxman, are all members of the United States House of Representatives. They have a substantial interest in the outcome of these cases distinct from that of any of the other parties. They seek a different result from that sought by the United States House of Representatives and the United States Senate, first, in that they seek a decision on the merits, and, second, in that they urge this Court to hold that the legislative veto provision of Section 244(c)(2) of the Immigration and Nationality Act of 1952 is unconstitutional. They seek the same results in these respects as do the Immigration and Naturalization Service and Respondent Chadha, et al., but *amici's* interests are different: They do not lie particularly in the direction of the suspension of Chadha's deportation, but in protecting the bicameral process required by Article I of the Constitution and in determining at what point the legislative process assigned to them and other members of Congress by Article I of the Constitution ceases and at what point the faithful execution of the laws by the Executive begins.

This case raises the question of whether or not there is a certain limbo in cases where the delegation to the Executive partakes of a "legislative" character, i.e., of a nature which could have been appropriately exercised by Congress itself.[1]

Amici's interest in the Court's illuminating this point is not purely academic. There are, in the House alone, at least 13 bills by more than 200 authors which call for some manner of legislative veto.[2] In seven bills now before the House[3] the

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[1]See House brief, at 25: "...Congress has withheld from the Executive some part of the function of executing the whole of a statute..."

[2]H. R. Res. 97, 243, 314, 383, 458, 945, 1043, 1108, 1128, 1130, 1678, 176 and 2299, 97th Congress.

[3]H. R. Res. 97, 314, 383, 458, 945, 1128 and 1678, 97th Congress.

veto is applicable only to acts deemed by Congress, or a House of Congress, to be contrary to law, inconsistent with legislative intent or beyond the mandate to the agency.[4]

In five others, there are not guidelines for exercising the legislative veto. Thus it may be exercised on purely policy grounds. Though the bills differ in scope, the sum total of their effect would be to call upon Congress to peruse most of the seventy-five hundred or more rules, regulations and orders that emerge from the Executive branch and the regulatory agencies each year.

Four of the bills[5] permit one House, if the other does not disagree, to call up existing rules for re-promulgation. When they are re-promulgated they must be submitted to both Houses. Either can pass a resolution of disapproval in thirty days and if the other House does not pass a resolution of disagreement the rule is vetoed (the "one and a half House veto"). Or the House and Senate may pass a concurrent resolution vetoing the administrative action. This could affect any number of the rules, regulations and orders now in existence.[6] It has been estimated that House and Senate staff would have to be doubled to take care of these loads.

Amici recognize that none of these questions is directly before the Court in this case. The detailing of these bills is done only to show why *amici* have a grave and immediate

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[4]Some of these bills are more complex. For instance, H.R. 3740 provides for a "contrary to law" determination in some cases of legislative veto and a purely policy determination in the others. It then calls on the courts to make the final determination of consistency with statutory authority but assigns to the court the purely *legislative* policy determination of ascertaining whether there was any "alternative means available for implementation or enforcement of the statute."

[5]H. R. Res. 1043, 1108, 1330 and 1776, 97th Congress.

[6]From 1932 to 1978, 159 acts of Congress have contained 214 separate provisions giving the Legislative branch direct review powers. Of that number, substantially more than half have been enacted since 1970. *See* Norton, *1978 Acts Authorizing Congressional Approval or Disapproval of Proposed Executive Actions*, Congressional Research Service Report, December 21, 1978, and the same author and source, *Congressional Review, Deferral and Disapproval of Executive Actions, A Summary and Inventory of Statutory Authority*, April 30, 1976.

interest in a case which will shed light on the question of legislative veto. The nature of this legislation standing in the wings also bears upon another interest of the *amici* separate from that of the respondents and the Immigration and Naturalization Service. If the Court should heed the argument which pervades the Senate brief, that Congress has a peculiar and pervasive power over immigration matters [7], *amici* feel strongly that nevertheless the Court's decision should not be so broad as to trip the avalanche of veto resolutions in bills, an avalanche which *amici* believe would overwhelm the congressional process.

Your *amici* are sworn to uphold and support the Constitution in the same measure as is this Court. They are also obliged to determine, within constitutionally permissible bounds, the policy issues involved in legislation before the Congress. The extent of those bounds has been sharply disputed on the floor of Congress, in its committees and in the academic community, yet the matter has never before come squarely before this Court. That is why *amici* have come forward to urge that the case be decided on the merits.[8]

STATEMENT OF THE CASE

Section 241(a)(2) of the Immigration and Nationality Act of 1952, 8 U.S.C. Section 1251(a)(2), directs the Attorney General to deport any alien "who is in the United States in violation of this chapter." Respondent Chadha, having remained in the United States for a longer time than permitted under his admission as a nonimmigrant student, was cited by the Immigration and Naturalization Service to show cause why he should not be deported.

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[7] See Senate Brief at 31, *citing Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

[8] *Amici's* interest is in the case on the merits of the question concerning the legislative veto. Their brief, therefore, will bear only on this point. They rely on the well reasoned rationale of the Court of Appeals for the Ninth Circuit on the point of standing, justiciability and severability to the effect that the merits of the case should be reached. Realizing that respondents will further fully brief this point, it would be repetitious for *amici* to cover these issues again.

Section 244(a)(1) provides that a deportable alien, so threatened with deportation, may seek a discretionary determination by the Attorney General that deportation would result in extreme hardship, in which case the Attorney General may suspend deportation subject to a legislative veto by resolution of disapproval by either House.

The suspension was granted and the House vetoed. Thus the provision of Section 244(c)(2) of the Act was triggered. It provides that "if either House of Congress passes such a resolution, the Attorney General shall thereupon deport such alien unless he departs voluntarily." Pursuant to such provision, the immigration judge ordered that Chadha be deported to the United Kingdom. Chadha appealed to the Board of Immigration Appeals, on grounds that the veto was unconstitutional. The Board denied the appeal, finding, *inter alia*, that it had "no power to declare unconsitutional an act of Congress."

Chadha sought review of the final order of deportation in the Court of Appeals for the 9th Circuit, contending that Congress had invaded functions vested by the Constitution in the Executive branch and that therefore its action was invalid and the suspension should stand. The Appeals Court held that the issues were severable and that the Attorney General's suspension of deporation should stand. The Immigration and Naturalization Service appealed and the Intervenors (House and Senate) filed petitions for certiorari.

SUMMARY OF REASONS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS

The Court below correctly held that the resolution of disapproval which overturned the Attorney General's suspension of deportation was the exercise of a legislative veto provision which unconstitutionally intruded into the realm of executive authority in contravention of the constitutional principle of separation of powers. We agree with and support that decision but also urge that there are additional reasons why the legislative veto provision of Section 244(c)(2) violates the scheme envisaged by the Framers in Article I of the Constitution.

If the legislative veto employed in this case is not to be considered an intrusion into the executive authority, the House veto must be seen as a "legislative act." Petitioners contend that this is the correct view of the House action. The gravamen of their contention is that the issue of deportation of an alien has been in the past and continues to be a matter for legislative determination: that the Immigration and Nationality Act of 1952 purported to grant to the Attorney General certain legislative authority, but that Congress retained ultimate legislative authority to make the final decision. Under this contention, the effective legislative act was taken by the House at a time far beyond presentment and final adoption of the 1952 Act.

It is then posited that, because deportation matters are a proper subject for legislation, and because Congress has the general authority to grant or deny relief from deportation, congressional participation in the *execution* of an act which has finally passed, being legislative, is therefore not a violation of the doctrine of separation of powers.

Such misapprehends the constitutional scheme. Article I, first provides the necessary process for enacting, altering or repealing law. It protects the President's right to veto, the Executive Department's proper sphere of "executing the laws", and the Judiciary's sphere of adjudicating them.

The fact that a function delegated to the Executive Department may involve policy determinations exactly like those which Congress could have reserved to itself does not in any way authorize Congress to step beyond the stage of presentment and final enactment, and further "legislate" along with the Executive on the theory that the nature of the delegated administrative function is "legislative".

If a purported legislative act (of vetoing the Attorney General's suspension) required concurrence of both Houses (but not presentment) it would clearly be unconstitutional as being in clear conflict with Article I, Section 7 of the Constitution. (Indeed, Section 244(c)(3) provides that deportation of aliens who are deportable for criminal and other specified reasons may be suspended only upon affirmative approval by concurrent resolution of the two House of Congress.)

The presentment clause may not be avoided by purporting to give legislative effect to unicameral action (thus avoiding direct confrontation with Article 1, Section 7) because such would permit Congress to perform a legislative act in a manner not authorized by Article I.

The provisions of section 244(c)(2) are an intrusion into the realm of executive authority. As a "legislative act" altering law after presentment, they violate the concept of bicameral process envisaged in Article I.

ARGUMENT

I. The legislative veto here is an intrusion into the Executive authority and thus a violation of the doctrine of separation of powers.

History of the Act

Until the passage of the Alien Registration Act of 1940, deportation of aliens illegally within the United States was mandatory.[9] Many cases of extreme hardship occurred as a result, and these could be alleviated only by private bills. Therefore, Congress established a procedure in the 1940 Act by which the Attorney General could suspend deportation in certain categories on grounds of extreme hardship.[10] Originally, Congress reserved, or purported to reserve, the right to disapprove by concurrent resolution, but in 1952, in the present Immigration and Nationality Act, Congress provided that either House acting alone could override the Attorney General's suspension of deportation in Section 244(c)(2).[11]

The Act establishes a complete administrative procedure, quasi-judicial in nature, by which an alien may present his case to a special inquiry officer in two phases: The first involves determination of whether the statutory conditions have been met (generally involving a question of law). The second involves determination of whether relief should be

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[9]Immigration Act of 1924, Pub. L. No. 139 §14, 43 Stat. 153, 162.

[10]Alien Registration Act of 1940, Pub. L. No. 670, 54 Stat. 670.

[11]Immigration and Nationality Act of 1952. 8 U.S.C. §1101.

granted (ultimately confided to the sound discretion of the Attorney General).

Chadha's Case

After having gone through this entire procedure and having been granted suspension of deportation, the fruits of Chadha's having satisfied the questions of law involved and the factual requirements of extreme hardship in the administrative proceeding were swept away by Congress' "executing its own vested legislative powers", as the House brief calls the veto action.[12]

Since no express concurrence was required, no patent violation of the presentment clause was involved. Therefore, the Court below relied altogether on the broad concept of separation of powers. The Court probed deeply into the elementary principles, because it felt such -

> ...necessary because no circuit or Supreme Court authority we have found holds that the Legislature has impermissibly invaded the prerogative of the Executive or the Judiciary absent a clause in the Constitution which confers the power upon another branch with great specificity.[13]

Amici believe the Court was correct in determining that the veto provision constituted an intrusion into the sphere of the Executive authority so as to violate the doctrine of separation of powers.

Activity indistinguishable from that in which Congress may itself engage is often delegated to the Executive. There could be no clearer example than that involved in this case. Congress has delegated to the Attorney General the authority to make the final negative decision in a case in which the

[12]Brief of the U.S. House of Representatives at 33. The veto action is here described accurately as legislative action. As such it is not restrained as is the carefully defined process applicable to the Attorney General's authority, which must not be exercised arbitrarily or capriciously. This distinction fully answers the so-called "illogic of the Executive's position" referred to in the House Brief at 40.

[13]*Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 420 (1980).

question is whether or not "extreme hardship" is involved in a deportation order. Formerly, Congress made the affirmative decision by passing a private bill, or the negative by refusing to do so.

When the Activity Enters the Executive Sphere

The House brief brings into sharp focus the proposition that is at the kernal of the issue of constitutionality of the legislative veto. That issue is not whether the authority delegated to the Executive is inherently legislative or executive in its nature but whether the activity has been committed to the Executive by the Congress in accordance with the Constitution.[14]

Arguments concerning the "inherent nature of legislative power" go to the question of whether certain activity can be delegated at all. In the past, it has been stoutly contended that a fine distinction should be drawn between inherently "legislative" and typical "executive" activity, but such sharp distinctions in dispatching powers, for many years now, have not been looked upon with favor.[15] When power is properly delegated, there can be no distinction as to how that power is executed based upon its "legislative" characteristics. Congress can no more step into the role of executor in that case than in the case of any other function delegated to the Executive Department.[16]

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[14]Attorney General's opinion contained in letter from Benjamin R. Civiletti, Attorney General to the Hon. Shirley M. Hufstedler, Secretary of the Department of Education, June 5, 1980.

[15]*Hampton & Co. v. United States*, 276 U.S. 394 (1928): *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

[16]Robert W. Ginnane, then in the Office of the Solicitor General, makes the point very clear in *The Control of Federal Administration of Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953): "Rather than enumerating what government acts may be performed by Congress, the Constitution defines the procedure Congress must observe when it does act, regardless of whether the matter involved is said to be legislative or executive in character. *Id.* at 571-2 ... [These] doubts are not particularly engendered by any rigid classification of government acts as legislative or executive. That many acts of government may be performed with equal propriety by the legislative branch or the executive branch may be conceded. The objection is rather to the manner of the exercise of the power." *Id.* at 593.

Congress clearly has authority to allocate powers (which may be quite mixed in nature) to various agencies or to retain certain unresolved legislative issues to itself for future determination. It may also anticipate contingencies which may arise; and, if these are envisioned in the original legislation with sufficient clarity, it may provide, in specifically defined ways, conditions subsequent which may govern such contingencies and affect the application of the law.[17] Certain activity which is properly delegable may combine characteristics that are highly discretionary with characteristics of administration and adjudication (in the nature of legislation); but once Congress, by passing a law, has performed the function of allocating responsibility, the separation of powers doctrine requires that Congress not control the discharge of those functions assigned to the Executive or the Judiciary except through the legislative process of amendment or repeal.[18]

Application of Buckley v. Valeo[19]

Congress can no more retain the authority in itself to step into the executive function after it has enacted legislation which delegates authority to the Executive than it can do so by appointing an agent to participate in the execution of delegated authority.

In the Federal Election Campaign Act of 1971 Congress attempted to establish a method of appointment of the members of the Federal Election Commission in a manner different from that provided in Article II, Section 2, Clause 2 of the Constitution for appointment of "Officers of the United States". A majority of the voting members were to be appointed by the President Pro Tempore of the Senate and the Speaker of the House.

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[17]See IV, *infra*, at 18.

[18]See discussion of this view by Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers; The Executive on a Leash?* 56 No. Car. L. Rev. 423, 466 (April, 1978).

[19]*Buckley v. Valeo*, 424 U.S. 1 (1975).

Parties supporting the legislative veto in that case were not so bold as to contend that the *ordinary* legislative authority of Congress may be extended into the field of execution of the law. They contended that Congress' power to regulate elections was extraordinary. But the Court found that authority of Congress over federal election practices was not so different from other grants of authority as to permit Congress to administer it through agents who were not executive "Officers of the United States." The Court said:

> The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause.[20]

Since Congress could not extend its authority into the field of execution of the law through the activity of its agents, Congress may not move into the executive field itself. The doctrine of separation of powers is violated by Congress' participating with the Attorney General in his exercise of a properly delegated administrative function (and finally overturning him) just as it would be if Congress attempted to appoint its own surrogate attorney general to perform the administrative function. Furthermore, if Congress can validly exercise the veto power, it may powerfully influence the Executive in administering the Act.[21]

II. If the veto is considered a "legislative act" it is in violation of the bicameral process mandated by Article I.

Contention that the Veto was a Legislative Act

It is said in the House brief that "... Congress in Section 244 has delegated to the Attorney General the execution of some but not all the legislative power over deportable aliens."[22]

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[20] *Id.* at 132.

[21] See discussion of this view by Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers; The Executive on a Leash?* 56 NO. CAR. L. REV. 423, 466 (1978).
Congress in the cases of five recent acts employing the legislative veto technique.

[22] House brief at 36.

The petition of the alien is there described as a "request for legislative mercy"[23] and it is said that "when either House exercises its *retained* [legislative] power under Section 244(c)(2) to pass a resolution, stating that 'it does not favor suspension of such deportation' it is exercising its own 'final and independent judgment' on the matter."[24]

Further, and most interestingly, the House brief equates the unicameral action to the bicameral process by which a private bill is enacted, saying:

> Congress has exercised exactly that kind of sovereign power in the enactment of private legislation excusing a named alien from the execution of the deportation order.[25]

At another place, the House brief states:

> The functions here said to have been invaded by the Congress, in enacting section 244(c)(2), are thus functions that lie within the power of Congress to grant or withhold in its sole discretion.[26]

But Congress did not withold delegation to the Attorney General of authority to make the "extreme hardship" determinations. In cases in which he finds no showing of "extreme hardship", authority is delegated to him to make a final and conclusive finding against the petitioner. Where he makes a determination of "extreme hardship" Congress purports to delegate to either of its Houses authority to reverse him and thus require deportation of the alien. Congress made its delegation by the regular statutory process in accordance with the bicameral requirements of Article I and subject to the presentment clause.

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[23] *Id.* at 40.
[24] *Id.* at 28.
[25] *Id.* at 37.
[26] *Id.* at 26.

Theory Underlying Delegation to a Single House

Thus, Congress has purported to authorize a single House, acting alone, to make a determination on an issue of fact and policy which has the effect of law. Under the former process, the same issue was bicamerally decided. At what point in this new process does the concurrence of the Houses take place that the alien be deported or that his deportation be suspended? Apparently it is at some point, *after* enactment of the authorizing legislation, in a " 'blended' form of government" whose core according to the House brief, is the "legislating body ... the body authorized by the Constitution to blend and mix, in statutory forms, the various powers of government, and to delegate some of its own legislative functions to Executive officers and agencies."[27]

Somewhere in this *potpourri* of powers must be found a concurrence of the House and Senate to deport Chadha if it can be said that the bicameral process mandated by Article I has been followed. There are no clear directions in the congressional briefs as to where concurrence may be found. The assumption, however, seems to be this:

Congress under Article I, Section 8, Clause 18, the Necessary and Proper Clause, may do whatever is "necessary and proper for carrying into execution the foregoing (Article I) Powers ...." The House brief deems it "necessary and proper" for Congress as a body to delegate to one of its Houses authority to make the major determination to override the Attorney General's suspension of deportation *after passage of the governing legislation* and during its engagement in the "blend and mix" of congressional functions with those of "Executive officers and agencies".

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[27] *Id.* at 24.

The Flaw in the Theory

This is a serious misapprehension of the effect of the Necessary and Proper Clause. As was said in *Buckley:*

> Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibition contained in §9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.[28]

The last line above could as well have read: "No more can it vest in itself the authority to create a 'blend and mix' of legislative and executive functions, ultimately controlled by action of one of its Houses acting alone."

There is a further flaw in the theory that the whole of Congress may delegate to one of its Houses power of exactly the same extent and scope that the whole body could exercise. Such a delegation would be unbounded by *any* standard, guideline, or even precatory admonition. As the House brief admits, the procedure here is equivalent to the action of Congress itself in enacting a private bill.

Congress can no more delegate to one of its Houses such completely uncanalized authority than it can delegate such to an agency. As Justice Rehnquist has pointed out, the proposition that Congress cannot delegate to another power to make a law is still a cardinal constitutional principle. *Field v. Clark,* 143 U.S. 649 (1982).[29] Subsequent decisions (holding that the rule against delegation of *legislative power* is not, however, so cardinal a principle as to allow for no exception) do not abrogate "the doctrine against *uncanalized* delegation of legislative power." [Emphasis added.][30]

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[28]*Buckley v. Valeo, supra,* at 135.

[29]Decision concurring in judment in *Industrial Union Department v. American Petroleum Institute,* 448 U.S. 607, 672 *et seq.* (1980).

[30]*Id.* at 675.

The authority to whom the power is delegated must be called upon to act within a field sufficiently defined "so that it may be known whether [it] has kept within it in compliance with the legislative will." *Yakus v. United States*, 321 U.S. 414, 425 (1944). If the field is the entire reach of legislative discretion, delegated from Congress to one of its Houses, there is no demarcation of the bounds of authority at all.

The effective action here is the veto of suspension of deportation by a resolution of a single House. A simple resolution of one House may not fulfil the office of "a legislative act." It may express a sense of one of the Houses or govern the House's internal affairs, but it cannot become law because it is lacking in that bicameralism that Article I demands.

III. The Veto as used here to fill the office of a "legislative act" circumvents the presentment clause.

The Point Where Legislation Ends

In the case of every act there must be a time when legislation ceases and administration begins. In the instant case there is no such dividing point. The theory of the House brief would permit Congress to continue to interfere legislatively, (i.e. change the law by successive policy decision) during the process of administration whenever the authority delegated is deemed "legislative" in nature. Under such a regime, the President's right to veto cannot be protected.

In order to satisfy the requirements of Article I of the Constitution, a bill when presented to the President must be the final work product of Congress. That is, it must not leave to Congress itself authority to alter the essential policy decisions which underlie it or to make policy decisions on facts under circumstances that arise for the first time when the legislative veto is under consideration. Such "legislative act" may not be left to a time *beyond* that at which the President has the opportunity to veto the legislation.

Effective Decision Made at Time of Veto

The policy question (of whether to suspend or not suspend Chadha's deportation) arose for the first time when the legislative veto was under consideration.

Let us suppose that the House and Senate were not opposed to the suspension. Had Congress "retained its sovereign legislative power to determine finally ... which deportable aliens should be allowed to become permanent residents of this country for reasons of 'extreme hardship' ",[31] and had it done so, such would have been by the silent acquiescence of the two Houses in the administrative determination of the Attorney General deciding in favor of suspension of deportation.

If the Senate and House may concur in this way, when is any "bill, resolution or vote" presented to the President for his approval or veto? There is no authority under Article I to legislate in this way. If there were, the legislative veto could be used by Congress as a device to place its legislative determination beyond the control of the presentment clause.[32]

In the instant case the House disapproved. Thus there was no concurrence. But a final choice was thus effectuated under the aegis of Congress' right to approve, or not, a choice in which the President had no say.

It is clear from the language of *Atkins v. United States*[33] that no such circumvention of the constitutional scheme is condoned. In that case it was said:

> *It is important to note that the one House veto is not, in the context of the present case, a device employed or available for the circumvention of the Constitution's scheme for the enactment of statutes* ... The President and the two Houses enjoy exactly the same say in what the law is to be as would have been true for each without

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[31]House brief, at 19.

[32]Ginnane, *supra* n. 16, at 596.

[33]*Atkins v. United States*, 556 F.2d 1028 (Ct. Cl., 1977), *cert. denied*, 434, U.S. 1009 (1978).

> the presence of the one-House veto, and nothing in the law is changed absent the concurrence of the President and the majority of each House ... [T]he one-House veto ... could do no more than negate the President's recommendations, leaving salary levels as they were in the existing law. [Emphasis added.][34]

In the *Atkins* case, the acquiescence of Congress could not constitute a circumvention of the President's veto power because the Salary Act of 1967 was his own recommendation. He certainly would not have vetoed House and Senate acquiescence in its passage. If one House exercised the veto, salary levels would be left as they were in the existing law; and, in order to alter such situation, a law would have to be passed under the ordinary process.[35]

The process in the Immigration and Nationality Act is different. The choice to deport or suspend deportation is left *wholly* to Congress or one of its Houses. The President cannot enter the area of law making to exercise his veto, as he could do in the case of a private bill.

IV. The constitutional requirements of bicameralism and presentment are not satisfied on grounds that the original act was properly passed.

The Condition Precedent Argument

The traditional argument for the legislative veto is that it is a mere condition precedent to an authorization made to the Executive in the original authorizing legislation. Under such a theory, it would be claimed that, as a condition precedent to the Attorney General's suspension of a deportation becoming effective, there would have to be a failure of either House to veto. This argument rests on the validity of the assumption that "unlike a new legislative act [the legislative veto] represents no inherent change in policy since it was contemplated in the enabling act."[36]

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[34] *Id.* at 1063.

[35] See Dixon's distinction of the *Atkins* case from other legislative vetoes which he considers unconstitutional, *supra* n. at 471 *et seq.*

[36] See statement of Joseph and Ann Cooper, supporters of the legislative veto, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 476 (1972).

The mere statement of the proposition demonstrates its inapplicability here, and House and Senate Counsels seem to recognize this. Accordingly, their theory, particulary as it is articulated in the House brief, is that Congress reserved until a later date an opportunity to act legislatively on the question of deportation by reserving to itself the opportunity to participate in a kind of executive partnership with the Attorney General in determining the deportation question.[37]

Inapplicability of This Argument

The House brief states:

> Thus the section 244 scheme is basically an exercise in limited delegation to the Executive of legislative and quasi-legislative functions respecting aliens ... Section 244(c)(2) in no way involves any congressional reviewer or 'veto' of vested or finalized Executive functions.[38]

Thus House counsel eschewed the theory that the action is a "legislative veto" exercised as a condition precedent to Executive action. It is clear why counsel was forced to do so. The condition precedent argument simply does not fit this case because the determination in favor of deportation is not merely subordinate or incidental to a policy determination underlying the previously enacted law.[39] Rather it is an exercise of an independent legislative determination, just like a decision not to proceed with a private bill to suspend deportation.

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[37]The practice in the House is that the Attorney General makes his decision, and then the staff on the Judiciary Committee analyzes it and makes the report ultimately resulting in a recommendation of the Judiciary Committee. The final determination in the negative is exercised by the House.

[38]House brief at 19.

[39]See Ginnane, *supra* n. 16 at 593-4: "But it is clear that the policy decisions ... that have been described - for example, ... the termination of the Attorney General's suspension of deportation of an alien ... are indistinguishable from the policy decisions and legal consequences of ordinary legislation."

Senator Javits and Mr. Klein, who support the validity of the legislative veto in some cases but not others, draw the line of demarcation this way: If "the post enactment congressional review is subordinate or incidental to previously enacted law [which was subjected to the presentment clause process] rather than an independent exercise of the legislative power," the provisions of Article I, Section 7 are not violated. But, as those writers concede, "[n]ot all variations of the legislative veto would necessarily preserve the functions of the presentation clause .... If the consequence of a legilative veto provision were the implementation of a congressional purpose free of presidential participation, the logic would break down."[40]

The questions to be asked under this theory are stated by Javits and Klein as follows:

> Is the character of the action by Congress an independent exercise of legislative power, or is it incidental or subordinate to legislation? Is the effect of the action to implement a congressional purpose free from presidential control, or is it in pursuance of a primary legislative scheme properly enacted?[41]

If it is the former, the legislative veto provision is unconstitutional; if, the latter, the provision is constitutional according to this argument.

The Senate's position on the facts is not different from that of the House. It treats the Immigration and Nationality Act and its establishment of the suspension process as having made "the executive an important participant in the process of granting relief",[42] and as having reserved in Congress the authority to act legislatively upon broad discretionary grounds. Thus the Senate brief quotes with approval an earlier decision of the Ninth Circuit relating to the process involved here in which it was said:

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[40]J. Javits and G. Klein, *Congressional Oversight and the Legislative Veto, A Constitutional Analysis*, N.Y.U. L. REV. 455, 484 (1977).

[41]*Id* at 485.

[42]Senate brief at 29.

> [W]e do not construe the committee's report as an effort by the Committee to tell the Attorney General how he should exercise the discretion delegated to him by Section 1254(a)(1). Rather, it is an explanation for the Committees having exercised the discretion committed to it by Section 1254(c)...[43]

But at this point the path of the Senate brief diverges from that of the House. On page 32 it states:

> The approval or disapproval by the Congress or by one of its Houses under a statute providing for legislative review is not an act of lawmaking. The requirements of bicameralism and presentation are fully satisfied by enactment of the underlying statute authorizing legislative review.

The House brief construes the effect of Section 244 in a quite different way. It states at page 28:

> At no point in Section 244 has Congress delegated to the Attorney General or the INS any final power to determine which illegal aliens should be allowed to remain in the United States for reasons of 'extreme hardship' to the alien or his family. Congress has retained that power unto itself as part of its 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden' .... And when either House exercises its retained power under Section 244(c)(2) to pass resolution stating 'that it does not favor the suspension of such deportation,' it is exercising *its own final and independent judgment on the matter. [Emphasis added.]*

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[43] *Id.* at 30.

What is an act of "final and independent judgment" on such a matter if it is not "lawmaking"?

When Congress purports to delegate to either of its Houses the authority to make an "independent judgment" as to whether an alien has "characteristics which Congress has forbidden", such is not a determination which is "incidental and subordinate" to the original legislation. It may not be considered as having been determined in the original legislation and thus made subject to bicameral process and review. Such post-enactment legislative review is clearly "an independent exercise of legislative power" and the House brief with commendable candor admits it to be so. But since this is so, it can neither escape the normal processes of legislative enactment nor ride through them on the back of the original authorizing legislation.

The conclusion of the Senate and House briefs, considered together, is that Congress may reserve to itself not only legislative authority "incidental or subordinate" to the original legslation, but also legislative authority which is "an independent exercise of legislative power."

Suppose suspension of deportation of a Polish National who was temporarily residing in this country was extremely important to the State Department under the specific facts adduced in the suspension of deportation hearing before the Attorney General. Suppose, though, for some reason, perhaps because of his nominal Communist party membership, one of the Houses of Congress elected to override the suspension by a one-House veto which is not subject to the presentment clause. Certainly such is "the implementation of congressional purpose free of presidential participation", and thus it would be unconstitutional.[44]

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[44]Joseph and Ann Cooper, who support the constitutionality of the legislative veto generally, do not go so far as do the House and Senate in their briefs. They say only: "If the legislative veto can be said to be ancillary to legislation and not legislation per se, and if therefore the veto can be accepted as properly exercisable by the Congress as a whole, then it would seem to be permissible for it to delegate the power to some part of Congress [Emphasis added]. J. Cooper & A. Cooper, *supra* n. 36 at 477.

The "post-enactment legislative review" involved in the instant case is clearly an unconstitutional "implementation of Congressional purpose free of presidential participation."

Conclusion

In delegating authority to the Executive, Congress has broad latitude between retaining for itself the determination of policy matters which may later arise and, on the other hand, relinquishing such determination to the Executive. But that choice must be made in legislation enacted under the process prescribed in Article I.

Congress may not both delegate significant policy determination substantially independent from the issues actually addressed in the orignal act and at the same time reserve its "legislative" function to control it.

To do so always transgresses the presentment clause and the doctrine of separation of powers. When an act purports to permit one House to veto executive action based upon an unbounded policy judgment, such an act also violates the Constitution's requirement of bicameralism and its prohibition against delegating lawmaking authority - the power to legislate after the act is in the executive sphere. Such is the nature of the authority sought to be exercised here through use of the one-House veto.

There are practical reasons why the Constitution prevents the Houses of Congress from stepping across the line marked by presentment and final enactment of an act. Congress performs best when it deals with principles. It is least well-equipped to act on individual applications of law. There it is most pressed by narrow special interests. *Amici* see this constitutional separation as a protection, not as a hinderance.

Amici urge that the judgment of the Court of Appeals for the Ninth Circuit be in all things sustained.

Respectfully submitted,

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January 8, 1982

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Nos. 80-1832, 80-2170, 80-2171

IN THE

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OCTOBER TERM, 1981

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v.
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UNITED STATES SENATE,
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On Appeal from and Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE COUNSEL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE COUNCIL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

The Council on Administrative Law of the Federal Bar Association moves this Court, pursuant to Rule 40 of the Rules of the United States Supreme Court, for leave to

file the annexed *amicus curiae* brief. In support of this motion, *Amicus* states:

1. The Council on Administrative Law of the Federal Bar Association has a strong interest in fair administration of the laws and in maintaining the integrity of the federal system.

2. The Council on Administrative Law of the Federal Bar Association is concerned about the legislative veto provision at issue in this case, and the deleterious effect of that provision on the fair and efficient administration of the immigration laws. Specifically, the Federal Bar Association's Administrative Law Council believes that the legislative veto mechanism, as applied in this case, has deprived petitioner of his right to fundamental fairness in the processing of his deportation suspension application.

3. The Council on Administrative Law of the Federal Bar Association is of the opinion that, as a general matter, the legislative veto device is an unwise and impractical means of policing federal agencies.

4. The Council on Administrative Law presents a point of view not otherwise advocated in this case.

5. *Amicus* has obtained consent to file this brief from counsel for all parties in this case except the United States House of Representatives. Counsel for the House of Representatives has declined to provide its consent.

For the foregoing reasons, the Council on Administrative Law of the Federal Bar Association respectfully requests that its motion for leave to file the annexed *amicus curiae brief* be granted.

Respectfully submitted,

PAUL C. ROSENTHAL
Attorney for amicus curiae
Council on Administrative Law,
Federal Bar Association

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BRIEF *AMICUS CURIAE* OF THE COUNCIL ON ADMINISTRATIVE LAW OF THE FEDERAL BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Federal Bar Association is an association of 15,000 attorneys who are employed by or practice before Federal administrative agencies, courts and the Congress. The Council on Administrative Law, a division of the Association, consists of 1,400 Association members

who are particularly concerned about the American administrative law process.* Members of the Council on Administrative Law have extensive administrative practice experience and a detailed knowledge of the interrelationship between agencies, courts and Congress. The Council on Administrative Law has a strong interest in fair administration of the law as well as maintenance of the integrity of the federal system. The members of the Council on Administrative Law have participated in a variety of court, congressional and agency proceedings and the Council presents a point of view not otherwise advocated in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the validity of Section 244(c)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1254(c)(2), which authorizes either House of Congress to veto a decision by the Immigration and Naturalization Service (INS) to suspend an alien's deportation. In the proceedings below, the Ninth Circuit Court of Appeals held that Section 244(c)(2), pursuant to which the United States House of Representatives vetoed the INS decision to suspend the deportation of respondent Jagdish Rai Chadha, violated the separation of powers doctrine embodied in the United States Constitution.

The Administrative Law Council of the Federal Bar Association (hereinafter "Council") urges affirmance of the Ninth Circuit's judgment on the merits. *Amicus* will demonstrate that the legislative veto mechanism embodied in Section 244(c)(2), and in numerous other statutes affecting private rights,[1] interferes with the

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* This brief represents the position of the Council on Administrative Law and should not be construed as the official position of the Federal Bar Association.

[1] Statutes that do not directly affect private rights, such as those that allow a legislative veto of executive reorganization plans, *see, e.g.*, 5 U.S.C. §§ 901-12 (expired), or arms sales, *see* Foreign Assistance Act of 1974, Pub.L. No. 93-559, 88 Stat. 1795-1820, raise issues that are not present in this case.

fair and efficient functioning of the administrative process. The Council believes that the legislative veto is improper, whether the mechanism is employed in an adjudicative or a rulemaking setting, because it conflicts with carefully developed tenets of administrative law.

In the adjudicative setting here presented, the legislative veto goes beyond poor policy to violate assurances of fundamental fairness accorded individuals subject to administrative justice. Whether or not the legislative veto mechanism available to the Congress under Section 244(c)(2) is actually employed to override an INS amnesty order, the device injects uncertainty and unfairness into the procedures for administration of the immigration laws. The legislative veto mechanism obliterates the safeguards established by INS procedural regulations and carefully observed by the agency in this case. It permits the Congress to ignore an essentially adjudicative decision of the Attorney General, and to do so without explanation and without consistency. Moreover, the operation of Section 244(c)(2) undermines the judicial review provisions of the statute by increasing the likelihood of improper extra-record contacts with the agency and by effectively denying any access to a tribunal that is uninfluenced by perceived congressional pressures. In short, Section 244(c)(2) operates to deprive deportees of fundamental fairness in deportation proceedings.

Should the Court employ a balancing test in assessing the legislative veto's constitutionality, the Court should be aware of the practical problems engendered by the device. Although the legislative veto is particularly harmful in the context of administrative adjudications, it similarly undermines the integrity of the administrative process when the device is used in the rulemaking context. The veto procedure inevitably thrusts the Congress into the day-to-day administration of substantive programs. The legislative veto undermines the administrative process by violating even the minimal procedural

safeguards provided in informal rulemaking. Such congressional review lacks the regularity and essential fairness that characterize judicial review upon a record developed in administrative rulemaking proceedings. The legislative veto mechanism results in inadequate records presented to courts for review. Overall, the legislative veto mechanism has an adverse impact on the administrative process without enhancing the ability of the Congress to oversee agency behavior effectively.

For these reasons, this Court should find that Section 244(c)(2) of the Act deprives petitioner and those in his position of fair and just adjudicative procedures. The Court should recognize that the legislative veto, when employed in an adjudicative or rulemaking context that is determinative of private rights, injects congressional whim into an orderly administrative process already subject to thorough judicial review.

ARGUMENT

I. Preservation Of An Orderly Administrative Process Requires A Decision On The Merits In This Case

The Council is well aware of this Court's reluctance to decide important issues of constitutional law unless the necessities of litigation so require. Counsel for the United States Senate and House of Representatives present various arguments designed to encourage the Court to dispose of this case on procedural grounds. The Court should decline to do so. Because of the Congress' increasing reliance on and advocacy of the legislative veto mechanism, the Council urges that the Court decide the constitutionality of the device. The issue is unquestionably significant and recurring. It should be decided in this case.

Contrary to assertions by counsel for Congress,[2] the legislative veto is not merely an experiment. Legislative

[2] *See* Petition For A Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit in No. 80-2170 at 18.

veto provisions are contained in over 270 separate provisions of over 190 laws that have been enacted since 1932.[3] More than one-half of these provisions were adopted since 1970 and nearly one-third in the last five years alone.[4] During the 96th Congress, 220 legislative veto provisions were proposed, 58 of which were enacted into 34 different laws.[5] Indeed, inclusion of legislative veto provisions in agency authorizing legislation has become almost routine.

Congressional use of the veto provisions already enacted into law also has increased. In recent years, the Congress has rejected rules issued by the cabinet level agencies and independent regulatory commissions and currently is considering rejection of a Federal Trade Commission rule applicable to used car dealers. Congress' veto of a Federal Energy Regulatory Commission regulation is already subject to litigation.[6] Increased use of the veto is certain to spawn additional lawsuits, even though standing is often difficult to obtain in such cases.

Conflicting federal appellate court decisions leave the constitutionality of the legislative veto in doubt. *Compare* the opinion of the Ninth Circuit in this case, *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980) *with Atkins v. United States*, 556 F.2d 1028, 1057-71 (Ct. Cl. 1977), *cert. denied*, 434

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[3] Cavanaugh and Norton, Congressional Veto Provisions and Amendments: 97th Congress, Library of Congress, Congressional Research Service, Issue Brief #IB 81138, November 25, 1981 at 1 (hereinafter "Norton").

[4] *Id.* Between 1974 and 1978, the Congress enacted at least 48 legislative veto provisions—more than in the preceding twenty years. *See* President Carter's Special Message to Congress on the Legislative Veto, 124 Cong. Rec. H.5879 (Daily ed. June 21, 1978) (H. Doc. No. 95-357).

[5] Norton, *supra*, n. 2.

[6] Consumer Energy Council of America v. Federal Energy Regulatory Commission, Nos. 80-2184 and 80-2312 (D.C. Cir.).

U.S. 1009 (1978). Because of the difficulty of obtaining judicial review of actions taken pursuant to the legislative veto, it is doubtful that another case will come before this Court for some time that more clearly presents the question of the validity of the device.

The need for a decision by this Court has been emphasized by impartial observers of the federal system:

> Unless the Court hands down a definitive ruling, lawyers for Congress and the executive branch will continue to slug it out. Meanwhile, routine federal operations are increasingly hampered and delayed because no one seems to be in charge.[7]

In short, a decision on the merits of this case is necessary to resolve these conflicting judicial decisions and bring order to the administrative process.

II. Section 244(c)(2) Deprives Petitioner And Similarly Situated Persons Of A Fair Adjudicative Process

By injecting elements of uncertainty and unfairness into the administration of the immigration laws by the INS, the Section 244(c)(2) veto provision renders meaningless the procedural safeguards built into INS deportation proceedings. As a result, none of the participants in these proceedings has any assurance that the agency process will affect the ultimate fate of the potential deportee. Moreover, judicial review may be frustrated by lack of a proper record because of congressional pressures on the Attorney General's decision which are not reflected in the record. Nor will independent judicial review of the Attorney General's final decision be available, because congressional action on the matter will color the judicial viewpoint.

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[7] Cohen, "Legislative Veto Battle Escalates—Should Congress Have The Last Word?", *National Journal*, September 6, 1980 at 1473.

A. *Section 244 Establishes A Fair Adjudicative Procedure*

The procedures governing petitions for suspension of deportation by the Attorney General are described in the opinion below [8] and are set forth in some detail in the submissions of the parties in this litigation. Nevertheless, a brief outline of these procedures will assist this analysis of the effects of the Section 244(c)(2) veto provision upon the suspension process.

Under the Act, an alien is entitled to a hearing on the question of whether he is deportable. 8 U.S.C. § 1252(b)(1976). During the hearing, an alien may apply to the hearing officer for suspension of deportation. *Id.* § 1254(a) (1976); 8 C.F.R. § 242.17(a) (1979). The hearing officer receives evidence on the issues of grounds for deportation and suspension thereof. 8 C.F.R. § 244.1 (1979). A suspension allows the Attorney General, in his discretion, to "adjust the status to that of an alien lawfully admitted for permanent residence." 8 U.S.C. § 1254(a) (1976).

The Act specifies three general prerequisites to consideration for a discretionary grant of suspension: period of residence in the United States, good moral character, and hardship. *Id.* As stated by the Court below, "[e]ach of these prerequisites requires a legal determination of a traditional sort, the contents of which are explicated by *an orderly history of administrative practice and judicial review and interpretation.*" *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 426 (9th Cir. 1980) (emphasis added). In addition, the Attorney General has provided procedural safeguards, including the opportunity to present evidence with respect to discretionary relief and a statement of reasons for his decision. 8 C.F.R. §§ 242.17(a), 242.18(a) (1979). The alien is afforded the opportunity to rebut even confidential information. *Id.* § 242.17(a). This

[8] Chadha v. INS, 634 F.2d 408, 425-29 (9th Cir. 1980).

Court has held that agency deportation procedures are consonant with due process. *See Marcello v. Bond*, 349 U.S. 302, 307-11 (1955).

Administrative findings of fact concerning eligibility for suspension must be supported by "reasonable, substantial and probative evidence on the record considered as a whole," 8 U.S.C. § 1105a(a) (1976), or a reviewing court will reject them. *Wong Wing Hang v. INS*, 360 F.2d 715, 716 (2d Cir. 1966). Similarly, agency conclusions as to the proper application of the statutory standards are subject to judicial scrutiny. *Dessalernos v. Savoretti*, 356 U.S. 269 (1958).

Taken as a whole, these procedures constitute a standard adjudicative scheme that provides a potential deportee with considerable protection from invidious discrimination, inconsistent application of the suspension criteria and biased fact-finding. With respect to respondent Chadha, the Attorney General's delegee conducted an independent investigation, considered evidence bearing on petitioner's character and the hardship that could result from his deportation, and made a reasoned determination to suspend his deportation.

B. *The Legislative Veto Provision Undermines The Orderly Operation Of The Suspension Process And Offers Little Or No Procedural Protection*

In order to completely vitiate the result of an adjudication by the Attorney General pursuant to the Act, all that the Congress need do is state, by one-House resolution, "that it does [or does not] favor . . . suspension . . . ." 8 U.S.C. § 1254(c)(2), (3) (1976). The statute does not require that Congress grant a hearing, state its findings and conclusions, or provide any of the procedural protections accompanying the prior administrative proceeding. Although the alien's attorney may discuss his client's case with congressional commit-

tee staff, there is no opportunity for a formal hearing with either staff or Members of Congress.[9] The statute does not mandate that the Congress consider only those criteria articulated in the Act; the Congress may uphold or overturn a decision of the Attorney General on the basis of discriminatory bias, pure politics or even an unstated quota standard.[10] And unlike the agency, the Congress need not explain any departure from prior precedents in order to account for the disparate treatment accorded similar cases. *See Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954).

Because there are virtually no procedural constraints on congressional decisionmaking under Section 244(c)(2), the protections afforded at the agency level are, from the alien's vantage point, wholly empty. There is no guarantee that the Government will act in a regular, predictable manner as to him. The administrative record, established in an adjudicative hearing, may be, and usually is, ignored by the Congress.

Moreover, the veto mechanism in effect short-circuits the judicial review procedures established by the Act. As the Congress may set aside suspensions for any or no reason at all, efforts on the part of the courts to ensure consistent application of the statutory criteria are doomed to failure. *See Chadha v. INS*, 634 F.2d at 430-31. If the judiciary engages in review of the Attorney General's final disposition of the case subsequent to congressional action under Section 244(c)(2), it is un-

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[9] Many, if not most, Members will vote on the suspension of an alien with little or no prior consideration. *See* Chadha v. Immigration & Naturalization Service, 634 F.2d at 427.

[10] For example, the Congress may one day decide that the Attorney General is granting too many suspensions, and may on this basis override particular decisions. *But cf.* Asimakopoulos v. INS, 445 F.2d 1362, 1365 (9th Cir. 1971) (Board of Immigration Appeals must apply statutory standards in classifying aliens eligible for suspension).

likely to proceed in its customarily independent, unbiased manner. To the contrary, the courts will inevitably be influenced by the prior congressional decision even if the ultimate act of deportation is taken by the Attorney General. *See* Bruff & Gellhorn, *Congressional Control of Administrative Agencies: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1429-33 (1977) [hereinafter cited as *Bruff & Gellhorn*]. In fact, this Court has in the past displayed considerable reluctance to review agency decisions that are subject to congressional review or control. *See Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318-19 (1958); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

Thus, whether court review occurs before or after the congressional decision, the alien is unlikely to obtain fair and meaningful judicial review. The legislative veto eviscerates the judicial power to review and protect the legal rights of individual aliens affected by government action.

The use or potential use of the veto mechanism also undermines the adjudicative process under Section 244 of the Act by increasing the likelihood of improper *ex parte* influence upon administrative actions. As a general matter, federal court decisions hold that when external pressure is brought to bear on adjudicative administrative decision-making, the parties involved have been deprived of fair process. For example, in *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966), a Senate subcommittee questioned FTC personnel, including Commissioners, with respect to a specific enforcement action then before the Commission. The Commission had not yet reached a final decision in the case; in fact, the company had not yet presented any of its rebuttal evidence. Noting that the congressional investigation focused "directly and substantially upon the mental decisional processes of [the] Commission *in a case pending before it*," the court held that the right to a fair trial with the

appearance of impartiality "cannot be maintained unless those who exercise the judicial function are free from powerful external influences." *Id.* at 964 (emphasis in original).[11]

Whether or not the Congress actually exercises its authority under Section 244(c)(2), the veto procedure inevitably affects the adjudication by the Attorney General of petitioner's status. Prior to actual congressional "review" of his decision, the prospect of such review may cause the Attorney General or his hearing officer to attempt to adjust findings or rulings to comport with perceived congressional preferences. This additional congressional leverage may lead the Attorney General or his designee to discuss particular suspension proceedings with Members of Congress or their staffs. Such extra-record pressure cannot, consistent with procedural fairness and with the statutory scheme, play any part in the ultimate adjudication of an alien's suspension petition. Moreover, the failure of the administrative record to reflect such pressures may render ineffectual subsequent judicial review.

In summary, the legislative veto established in Section 244(c)(2) empowers the Congress to overrule decisions of the Attorney General that are reached after full, adjudicative administrative proceedings. These proceedings are characterized by careful adherence to traditional procedures designed to protect the substantive rights of individuals faced with deportation from the United States. Nothing mandates that the Congress adhere to

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[11] *See also* D.C. Federation of Civic Assoc. v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (agency decision-making invalid if based to any extent on pressures emanating from Congress (rulemaking)); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224, 106 U.S. App. D.C. 30 (D.C. Cir. 1959) (when agency proceeding involves conflicting claims to a valuable privilege, ex parte contacts violate due process); 2 K. Davis, Administrative Law §§ 12.01 *et seq.* (1958) (discussing effects of bias in agency decisionmaking).

these or any other procedures in the exercise of its veto power. Moreover, because review authority is lodged in the Congress, effective, independent adjudication of suspension cases by both the agency and the reviewing court is substantially jeopardized. Thus, no matter how scrupulously the Attorney General and the courts strive to exercise their responsibilities under the Act, the legislative veto provision inevitably diminishes the integrity and effectiveness of their decision-making.

These considerations compel the conclusion that Section 244(c)(2) undermines the administrative process and deprives petitioner and similarly situated aliens of a fair adjudicative proceeding.

III. The Legislative Veto Seriously Undermines The Rulemaking Process

The practical defects inherent in the legislative veto mechanism as used in administrative proceedings are strikingly apparent in the context of agency rulemaking. Many of the legislative veto provisions enacted in recent years pertain to rulemaking proceedings of executive departments and agencies. Because any decision by this Court on the merits of the legislative veto will affect the use of the device in rulemakings, it is important that the Court closely examine the practical effects of congressional vetoes of agency rules.

The legislative veto thwarts rulemaking procedures at the agency level and substitutes hasty and standardless congressional review for meticulous, on-the-record judicial consideration. Moreover, the legislative veto is not only disruptive of established procedures and judicial review, but also unnecessary to further the avowed congressional objective of strengthening the oversight function. The Congress has several alternative means of overseeing agency action. The Council believes that vigorous pursuit and refinement of these alternative mecha-

nisms is far preferable to the procedurally debilitating legislative veto.

A. *The Specter Of A Legislative Veto Undermines The Fairness Of Rulemaking Proceedings*

Since the inception of the modern administrative agency, this Court and the lower federal courts have compelled strict adherence to the rule that administrative decisions must be both reasoned and reasonable. When engaging in either rulemaking or adjudication, an agency must base its decisions on the prescribed statutory standards, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971); *Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980), and on the record before it, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir.), *cert. denied sub nom. Public Service of New Hampshire v. Seacoast Anti-Pollution League*, 439 U.S. 824 (1978). Agency action based upon improper considerations must be overturned. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 420-21.

The major requirements of the Administrative Procedure Act for informal rulemaking are that proper notice be given to the public and that interested persons have an opportunity to present their views. *See* 5 U.S.C. § 553 (1976). In recent years, the courts and the Congress have imposed additional but nevertheless minimal requirements to assure a fair administrative process. The purposes behind these added requirements have been summarized as follows:

> One is to assure fair treatment of persons submitting comments by requiring actual agency consideration and response. A second is to foster reasoned agency decision-making by exposing thinking within the agency to public criticism and by requiring rea-

> soned resolution of the issues. A third is to facilitate judicial review by providing a record to justify a final rule.

Bruff & Gellhorn at 1376-77. The legislative veto has a serious adverse effect on even these relaxed procedural safeguards. As a result, the Administrative Conference of the United States, a prestigious body of government officials and public experts in administrative law, adopted in 1977 a recommendation against the legislative veto of agency rules. *See* 1 C.F.R. § 305.77-1 (1981).

The reasons for rejecting the legislative veto are clear and compelling. The Congress, in exercising legislative veto power, is neither bound by the agency rulemaking record nor required to create one of its own. Congress need not obtain comments from affected persons, nor must it consider any of the views managed to be presented. In short, at the stage of congressional review, the agency's record, however carefully constructed, is likely to become irrelevant. Unfortunately, there is no guarantee that any other record will replace it.

Moreover, the possibility of congressional review may subvert the agency's own construction of a record in two ways. First, affected parties may decide to withhold their best evidence and arguments until the point of congressional review because they know that the agency's record may prove unimportant, and that opposing parties will have less opportunity to rebut that evidence during the limited congressional review period. Second, the agency's decision-makers may be inclined to negotiate over the regulation with Members of Congress (or congressional staffs) during the final decisional process in order to prevent a veto. *See* Bruff & Gellhorn at 1409-12. This *ad hoc*, extra-record manner of decision-making further undermines the rulemaking process. Agency speculation on the effects of pressure on the Congress and the actual application of pressure by the Con-

gress during negotiations contravene the purposes of established procedural safeguards. *See id.*

B. *The Legislative Veto Obstructs Thorough, Independent Judicial Review Of Rulemakings*

One of the primary reasons why lower courts and this Court have insisted upon fairness and regularity in rulemaking procedures is to ensure that administrative decisions are accompanied by a record suitable for judicial review. Only if the reviewing court has before it a complete record of what factors actually influenced the decision-maker can it determine whether or not the regulation was issued in a proper manner.

By reducing the value of agency rulemaking records and providing for unchanneled congressional review, the legislative veto impairs the proper functioning of the courts. As discussed above, absent an adequate record for review, judicial scrutiny of regulatory decisions is hampered. Judicial review suffers, too, when it must follow and evaluate an essentially political act or failure to act by the Congress.

As is the case with congressional review of immigration proceedings, no meaningful standards exist or could be devised for legislative review of rulemakings. The only operative standard is whether or not a resolution disapproving any agency rule can attract the requisite majority of votes cast. Effective judicial review of such standardless action can only be illusory.

C. *The Congressional Review Process Provided By The Legislative Veto Mechanism Is Inadequate and Unnecessary*

Most statutes implementing congressional veto provisions provide that review take place within a limited period of time.[12] The Congress may have only a few months or less to review rules promulgated by an agency

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[12] *See generally* Norton, *supra*, p. 2-7 & n.2.

pursuant to years of study and voluminous and highly technical findings of fact. Administrative records compiled in rulemaking proceedings are often lengthier and more complex than adjudicatory records. Rulemaking records exceeding 50,000 pages are not uncommon. Because of the short review period involved, rules subject to congressional review may receive at best only cursory evaluation by a few Members of Congress or their staffs. Indeed, one empirical study of veto provisions found that "the existing time pressures on Congress significantly affected the quality and thoroughness of congressional review." Bruff & Gellhorn at 1414.

Even if lengthier review periods were provided, it is unlikely that Members and their staffs would have adequate time to perform thorough review of regulations while discharging concurrent legislative duties.[13] Or, congressional review might engender delays that result in no decision from either the Congress or the agency, leading to confusion among regulated entities. The prospect of any more delay in what is often already an unduly lengthy process is hardly welcome. In cases where the period for congressional review is tolled by adjournment, the additional delay could easily exceed several months.

The legislative veto, particularly one that provides the Congress with little time to review agency rulemaking and that specifies no standard for review, also reduces the effectiveness of public participation in legislative proceedings while increasing the influence of interest groups that enjoy access to congressional decision-makers. *Id.* at 1412-14. As agency officials speculate as to how the Congress will act and tailor their decisions accordingly, private participants with the financial wherewithal and political power turn their attention to the Congress. Although the problem of special interest pres-

[13] *Id.*

sure is endemic to the legislative process, a requirement that the Congress act hastily through the legislative veto exacerbates these pressures on fair and open agency rulemaking procedures.

The Council fully agrees with the goal of effective congressional oversight. The legislative veto, however, is unnecessary to this end. Congress has a multitude of methods by which to oversee the process [14] including, of course, the passage of legislation to overturn agency actions. For example, the Congress speedily passed legislation overturning the safety belt interlock regulation, which had aroused widespread public concern.[15] The Congress has also passed legislation requiring an 18-month delay to the saccharin ban proposed by the Food and Drug Administration.[16] More recently, the Congress approved legislation changing regulatory standards for power lawnmowers.[17] Whether or not one is in sympathy with these congressional actions, it is clear that the Congress can, when it so desires, control perceived administrative excesses by enacting legislation that is acted upon by both Houses and presented to the President for his signature. The legislative veto is thus not only unwise, but also unnecessary.

CONCLUSION

The legislative veto device disrupts the administrative process without benefitting the congressional oversight function. Moreover, the legislative veto lacks any semblance of orderly and thoughtful decision-making. In-

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[14] *See generally* 2 Study on Federal Regulation, Committee on Governmental Operations, U.S. Senate, 95th Cong., 1st Sess. (1977).

[15] Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109 (1974).

[16] Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977).

[17] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

deed, the congressional veto may be viewed as the unnecessary and improper pause.

The increased use and abuse of the legislative veto mechanism requires a decision on the merits of this case. Respondent Chadha has already been subjected to a chaotic and unfair process which has been visited upon him because of the legislative veto. Countless other holders of private rights will also be adversely affected by the continued adoption and exercise of the legislative veto in rulemaking proceedings. *Amicus* respectfully requests that the Court bear these considerations in mind as it rules in this case.

Respectfully submitted,

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